IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1923.

UNITED STATES OF AMERICA, et al.,
Appellants,

v.

NEW YORK CENTRAL RAILROAD COMPANY, et al.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF ON BEHALF OF THE INTERNATIONAL FEDERATION OF COMMERCIAL TRAVELERS ORGANIZATIONS, AS *AMICUS CURIAE.*

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JAMES W. GOOD,
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BARNARD & MILLER PRINT, CHICAGO.

TOPICAL INDEX.

CASES CITED.

ABBREVIATIONS:

FOR CONVENIENCE WE USE "COMMISSION'S DECISION" TO REFER TO THE DECISION OF THE INTERSTATE COMMERCE COMMISSION IN THE PROCEEDING ENTITLED *INTERCHANGEABLE MILEAGE TICKET INVESTIGATION*, DOCKET 14104, 77 I. C. C. 200, AT ISSUE IN THIS PROCEEDING.

"CARRIER'S BRIEF" REFERS TO THE BRIEF FILED IN THE DISTRICT COURT OF THE U. S. FOR THE DISTRICT OF MASSACHUSETTS IN *N. Y. C. ET AL. v. U. S.*, IN EQUITY 1808, BY COUNSEL FOR THE NEW YORK CENTRAL, ET AL., TIONERS BELOW.

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STATEMENT OF THE CASE.

INTRODUCTION.

The power of Congress, and of the Interstate Commerce Commission, to prescribe lower passenger fares than those applicable to ordinary one trip tickets when a party purchases transportation aggregating 2,500 miles is, in substance, the chief issue in this proceeding. To what extent does the Government have jurisdiction over the passenger traffic of the country?

This case involves the validity of an order by the Interstate Commerce Commission directing the sale of

non-transferrable interchangeable scrip coupon books for passenger travel in the denomination of $90 at a reduction of 20 per cent below the face value of the said tickets, good for one year from date of purchase. Interchangeable Mileage Ticket Investigation, Docket 14104, 77 I. C. C. 200,647, hereafter referred to as: Commission's decision.

The Commission's order was dated March 6, 1923, and was made pursuant to the recent amendment of Section 22 of the Interstate Commerce Act. A permanent injunction against the enforcement of this order was granted April 23, 1923, by the District Court of the United States for the District of Massachusetts. *New York C. R. Co. et al.* v. *U. S.*, 288 Fed. 951.

The organization filing this brief has an aggregate membership at the present time of approximately seven hundred thousand commercial traveling men throughout the United States, and these members are vitally concerned in the outcome of the pending litigation.

In freight traffic, for many years, practically all of us have recognized the propriety of adjusting rates on different commodities or on the same commodity, in accordance with the circumstances and conditions surrounding the traffic.

Some persons have insisted on the postage stamp basis of making charges for both passenger and freight traffic, making them uniform for all people regardless of varying conditions. The general concensus of opinion has been that such a theory is impracticable, and a schedule of rates so adjusted could not possibly meet the needs of the public. A flat maximum rate per ton mile throughout the United States, for all hauls, and for all commodities, regardless of conditions, is an unheard of thing,

and would meet with universal disapproval. And yet that is the basic principle that counsel for the railroads in this case desire to force upon Congress and the Interstate Commerce Commission, so far as their activities are concerned in the passenger traffic of the United States. They base their claim on *dicta* contained in *Lake Shore & Michigan Southern Railway Company* v. *Smith*, 173 U. S. 684, hereinafter generally referred to as the Lake Shore case, and certain decisions by state courts which have followed that as a controlling precedent.

As to freight traffic the Commission for many years had no power to fix maximum rates. It was held that the Commission could recommend, but that the power to fix rates would constitute an unwarranted interference with the managerial activities of a private corporation; and Congress declined to grant such powers to the Commission for more than seventeen years after its creation. Ultimately, however, it was felt that the railroad industry, rapidly organizing into a single compact body, was exercising a public function of such large importance to the community, with the power to wreck or build up enterprises and towns and cities, that it was wise to have a disinterested tribunal with adequate power to require the establishment of reasonable, just, and nondiscriminatory freight rates.

Other powers to make orders affecting safety appliances, issues of stocks and bonds, etc., have been added from year to year.

In this development, lasting more than a generation, it is a noteworthy fact, cited by counsel for the Government before the lower court, that no part of the Interstate Commerce Act, or any amendment thereof, has ever been held to be unconstitutional.

In each advance step taken, as Congress has added this power or that one, it has always met with determined resistance on the part of the railroads as an unwarranted invasion of their private domain.

Discriminations in charges between persons and localities have constituted one of the chief causes for the creation of the Interstate Commerce Commission, a tribunal which has rapidly assumed a position of commanding importance in our commercial life.

It was early recognized by the Commission, as well as by the Courts, that the Commission must exercise its powers in regard to freight traffic with full recognition of the varying conditions surrounding the traffic. A uniform ton mile rate has never been known in the industry. Freight rates rightly vary with the distance, density of traffic, character of commodity, etc., and when the Commission has failed to consider the conditions surrounding the traffic the courts have very promptly acted to correct the situation. A mere comparison of rates without the consideration of the attendant circumstances, is of no consequence in a freight rate case, for it ignores the fundamental clause of the entire law requiring equality of charge for similar services under substantially similar circumstances and conditions.

The same principle has been slower of recognition as applied to passenger traffic, and some grievous errors, consequently, have been made. Both the Supreme Court and the Commission have been compelled to modify their former conclusions, if not to reverse themselves. (The Lake Shore case, *supra*, and *Penn. R. Co., etc.* v. *Towers, et al.* 245 U. S. 6; *Sprigg et al.* v. *B. & O., et al* 8 I. C. C. 443, and the Commutation Rate Case, 21 I. C. C. 428; *Re* Passenger Tariffs, 2 I. C. Rep. 445; *P. C. C. & St. L. R.*

Co. v. *B. & O. R. Co.*, 2 I. C. Rep. 729, and In the Matter of Party Rate Tickets, 12 I. C. C. 96.) This is a natural development, for passenger traffic does not present the wide variation of freight traffic as to weight, bulk and value. However, as time has passed on we have gradually learned that there are important basic differences in the conditions surrounding passenger traffic, which must be recognized if justice and the best interests of the community shall prevail. It is utterly idle and superficial to prate about the passengers riding in the same cars, in the same train, and on the same road bed. The same is true as to freight traffic, and yet freight charges vary in accordance with the conditions. The differences in conditions are not of the same character in the passenger traffic as in the freight traffic; and that has been the principal source of confusion in our thought as to these problems.

In their zeal to have absolute equality regardless of conditions, there were some at first who claimed the railroads had no right to prescribe different charges per passenger mile under different circumstances, although the best interests of the public and the fair recognition of the rights between individuals dictated that there should be such a variation to meet conditions. The railroads were the chief advocates this time, and they finally succeeded in compelling the proper recognition of this proposition. Then it was claimed—just as occurred originally relative to freight traffic—that while the railroads could make these distinctions, the Government had no right to do so. This time the railroads were on the other side. And today we are witnessing an exhibition of their championing this impossible doctrine. We are told that the Government can fix only one uniform fare for passenger traffic, the same charge for each mile a pas-

senger may travel throughout the United States, and then its task is completed; it must keep hands off unless it wants to make a horizontal increase or decrease in that single rate. We are informed that the Government in dealing with passenger matters must be blind to varying circumstances and conditions. All that must be reserved to the superior wisdom of our railroad friends, and the Government must exercise no jurisdiction, we are told, over the different classes of passenger traffic.

The very statement of the proposition would seem to demonstrate its absurdity, without the need of argument. But we must carefully go through the record before us in order to demonstrate that there are genuine differences in conditions surrounding passenger traffic, that the railroads themselves have recognized this for a half century, that there is no so-called single uniform passenger fare which has been established by the Government throughout the nation thereby foreclosing further action on the part of the Government. And we must further consider the character of the investigation and of the order made by the Commission, to see if there was a mistake of law; and then an analysis of the facts is necessary to test the soundness of the claim of confiscation advanced by the carriers in this proceeding.

• • •

Prior to August 18, 1922, Section 22 of the Interstate Commerce Act contained certain permissive provisions authorizing carriers to issue mileage, excursion and commutation passenger tickets; but there was no affirmative grant of power to the Commission in this section.

The following amendment of Section 22 was approved August 18, 1922:

> "(2) The Commission is directed to require, after notice and hearing, each carrier by rail, subject to this Act, to issue at such offices as may be prescribed by the Commision interchangeable mileage or scrip coupon tickets at just and reasonable rates good for passenger carriage upon the passenger trains of all carriers by rail subject to this Act. The Commission may in its discretion exempt from the provisions of this amendatory Act either in whole or in part any carrier where the particular circumstances shown to the Commission shall justify such exemption to be made. Such tickets may be required to be issued in such denominations as the Commission may prescribe. Before making any order requiring the issuance of any such tickets the Commision shall make and publish such reasonable rules and regulations for their issuance and use as in its judgment the public interest demands; and especially it shall prescribe whether such tickets are transferable or nontransferable, and if the latter, what identification may be required; and especially, also to what baggage privileges the lawful holders of such tickets are entitled."

PROCEDURE BEFORE THE COMMISSION.

Due process of law contemplates, among other things, an orderly procedure in the determination of litigated matters. After the enactment of the foregoing amendment to Section 22 of the Act, the Commission issued a notice calling for a hearing in which the following questions were proposed as subjects to be considered:

"1. Shall both interchangeable mileage and scrip-coupon tickets be issued and sold? (2) What rate or rates shall be established as just and reasonable for each or either form of ticket? (3) What conditions, if any, should be attached to the issuance and sale of such tickets by reason of the existence of different levels of passenger rates in different sections of the country? (4) In what denominations shall the ticket or tickets be issued? (5) In general, at what offices of carriers shall the tickets to be prescribed be available to the public? (6) What rules and regulations for the issuance and use of these tickets shall be required? (7) Shall the tickets be transferable or non-transferable? (8) If non-transferable, what identification may be required? (9) To what baggage privileges shall the lawful holders of such tickets be entitled?" (Petition, pp. 36-37.)

The order of investigation also called for a statement from those desiring exemption from the order. This notice was issued August 23, 1922, and the date of hearing was fixed as September 26, 1922. The hearing was conducted before Chairman Meyer of the Interstate Commerce Commission at Washington, D. C., and was participated in by the representative railroad organizations of all regions in the United States, and by many large organizations of commercial traveling men and shippers. The case was submitted November 15, 1922. A decision was rendered and issued January 26, 1923, fixing March 15, 1923, as the effective date of the order when the carriers should establish the fares prescribed. In the meantime another hearing was conducted as to the rules and regulations to be prescribed as required by the Act. The hearing was closed February 23, 1923. On March 6, 1923, a supplemental report was issued presenting the rules and regulations which had been approved.

All the essential steps were taken which are necessary under the orderly procedure of the Commission; and no parties make claim, to our knowledge, that they were denied a full hearing.

INJUNCTION PROCEEDINGS.

A petition was filed March 30, 1923, in the Federal Court for the District of Massachusetts, by the carriers earning in 1922 88.23 per cent of the passenger revenues of all Class I railroads in the Eastern Group (as classified by the Interstate Commerce Commission), seeking to enjoin the enforcement of the order of the Commission establishing these "scrip book" regulations providing for the issuance of interchangeable scrip coupon tickets. Hearing was had and an opinion was rendered April 23, 1923, and the final decree was issued May 15, 1923, ordering a permanent injunction against the enforcement of the Commission's order.

The evidence offered before the lower court included the following:

1. The record before the Interstate Commerce Commission in the proceeding entitled, Interchangeable Mileage Book Investigation, No. 14104.

2. Two short affidavits by Julius H. Parmelee stating the total income and expenses from all sources, without separation as between freight and passenger traffic; also the gross revenues from passenger traffic without any statement as to expenses of the passenger traffic, and without any statement of the value of the property devoted to passenger traffic; also the tentative findings concerning the value of railroad property in the United States, as made by the Interstate Commerce Commission in 1920, with subsequent additions of property.

The Parmelee affidavits show that 98.39 per cent of the total net railway operating income of all railroads in the Eastern Group was earned by Class I railroads.

3. One affidavit by Samuel Blumberg on behalf of the National Counsel of Traveling Salesmen's Associations, and Garment Salesmen's Association, Incorporated describing the character of these organizations and the manner in which they are concerned in the matter under consideration.

Some of the significant facts contained in the record before the Interstate Commerce Commission and in the decision of the Commission are as follows:

The passengers per train, per car, and the total passenger miles over a period of years, are shown in the following table:

Calendar year	Passengers per train	Passengers per car	Revenue Passenger miles
1916.....	56	16	34,586,000,000
1917.....	65	17	39,477,000,000
1918.....	76	20	42,677,000,000
1919.....	82	21	46,358,000,000
1920.....	80	20	46,849,000,000
1921.....	67	16	37,329,000,000
1921 (first six mos.)	66	16	18,382,000,000
1922 (first six mos.)	60	15	16,487,000,000

(Commission's decision, page 203.)

The total passenger revenue in the United States for the first six months in 1922 aggregated approximately $500,000,000 (being stated in a dissenting opinion by Commissioner Daniels at page 219).

The carriers estimated the total passenger revenues for the year 1922 in the United States to be approxi-

mately $1,000,000,000; 30 per cent of which, or $300,000,000, will be affected, according to their claim, by the order of the Commission in this proceeding. (See Carriers' Brief before the Lower Court, p. 85.) The carriers claim that the 20 per cent reduction ordered by the Commission will involve $60,000,000. (See same page of said Brief; also see Appendix A, following Commission's decision at page 221 of the same.) The figures for the nation were used by the carriers to which certain percentages were applied to secure an estimate of the corresponding figures for the carriers involved in this case.

The carriers claim that the additional expense of accounting and policing the use of the scrip books for Class I carriers in the United States will be approximately $1,680,000 per annum. Commission's Decision, 208

A digest of the record before the Commission as to the reductions in effect in the mileage books which were abolished by the Railroad Administration in 1918, together with a statement as to the amount the said mileage books were used, is contained in the following extracts from the brief filed on behalf of all carriers before the Interstate Commerce Commission in the investigation aforesaid, Docket 14104:

> "When the mileage books were abolished by the Railroad Administration, they were being sold at reductions below the normal fare, ranging around 10 per cent, 16⅔ per cent and 20 per cent. Thus Mr. Fox states (385-386) that the discounts prior to Federal Control were as follows:
>
> 'In New England, 10 per cent;
>
> In Central and Trunk Line Passenger Association territories, 10 per cent;
>
> In Southeastern Territory, 20 per cent; but in this connection it must be remembered, as stated above.

that the Commission had authorized an increase in the charge for the mileage book from 2 cents to 2¼ cents per mile, so that this would have become a discount of only 10 per cent but for the action of the Administration in withdrawing the mileage books entirely and reducing the discount to nothing;

In Southwestern Territory, 16⅔ per cent;

In the Central West, when the 2 cent rate was effective throughout the country, there was no reduction on the part of any line from the basic intrastate fares by the use of mileage, and a very considerable portion of the revenue of the carriers derived from intrastate traffic in those States. (386)." Carriers' brief before the Commission in Docket 14104, pp. 14-15.

"The use of the old mileage books cannot be accurately stated because of the different conditions in different sections of the country. At page 29, Mr. Fox said that some years ago about an average of not less than 20 per cent of the total passenger revenue in certain sections of the country was derived from mileage tickets; that, in fact, on some lines as high as 60 per cent of the total passenger traffic was so moved; and, in the first of these instances, the use of the mileage tickets represented this percentage of travel, although they were restricted to smaller territorial limits and were not interchangeable as between all lines in the territory (29). He also pointed out that in other sections the percentage would not run as high (31-32). Mr. Rose, the accounting witness on behalf of the carriers, stated that, during the period when interchangeable mileage books were used, the use in the territory to which he referred (*i. e.*, Southeastern territory) was approximately 20 per cent (91). See also the testimony of Mr. Fox at page 107 and of Mr. Rose, at pages 220-221.

The scrip book currently in use which is sold on the basis of the normal one-way fares represents about 1 per cent or less of the carriers' pas-

senger revenues (91, 139)." (Carriers' Brief before the Interstate Commerce Commission, pp. 15, 16.)

CARRIERS' PETITION BEFORE THE LOWER COURT.

There are certain statements contained in the carriers' petition and brief before the lower court that may be presented to this tribunal, which deserve mention. There is a large volume of duplication in different portions of these documents. The petition has many of the characteristics of an argument, and we shall attempt in the following passages to discuss very briefly certain propositions they have stated, this being done consecutively in the order presented by the carriers. This plan, unfortunately, will occasion a similar duplication, which seems to be unavoidable. We shall endeavor to eliminate as much of this as possible. (In future citations to the brief filed by the carriers before the lower court we shall use the expression: Carriers' Brief.)

At this time we shall not undertake to place these comments in order under the headings used in our general argument, but shall simply attempt to recite them in the order as they appear in the petition of the carriers in the first instance.

The first eight sections in Carriers' petition before the Lower Court are largely devoted to formal allegations.

In paragraph IX of said petition the carriers allege that the Commission established as the "just and reasonable rate" for the transportation of passengers "the rate of 3.6 cents per mile, which rate of fare accordingly became the established just and reasonable rate for this service."

This is an erroneous allegation, due to a misconcep-

tion of counsel for the carriers, as to the character of the decision by the Interstate Commerce Commission in *Ex Parte* 74. This will be presented fully in that portion of this brief under the heading Argument.

Other references to the rate of 3.6 cents, repeatedly made in the petition as being the "established just and reasonable rate" are likewise erroneous.

Paragraph X of the Carriers' petition before the lower court alleges a variation between the findings of fact and the conclusions of the Commission. The carriers, aside from this general allegation, cite certain figures, the additional costs being alleged to equal $1,600,000. The Commission considers this as an offset to the interest on the $300,000,000 which the carriers say they will receive in advance of the use of these scrip books. The propriety and sufficiency of this offset will be considered in conjunction with the other cost accounting under the heading relating to the alleged confiscatory character of the order of the Commission which will be presented in that portion of this brief labeled, "Argument."

In paragraph XI, the carriers allege that the order of the Commission at issue will require them to perform service at rates which are noncompensatory. They then refer in an argumentative manner to the operating ratio on all passenger traffic and attempt to demonstrate the net loss.

In paragraph XII of their petition, the carriers allege that the physical conditions of transportation are the same for the holder of the scrip coupon as for other passenger travel under the standard fare in an ordinary interstate train.

A similar comment could be made as to preachers,

railroad employees, tourists, excursionists, delegates to political and church conventions, etc.

The significant factor is that the average inhabitant travels only about 250 to 350 miles per year, whereas the holders of these tickets must travel 2,500 miles or seven or eight times as much; and on an average the holder of these tickets will probably travel 5,000 miles or more.

Paragraph XIII of the carriers' petition raises a similar issue as paragraph XII, except that it refers to the unreasonable preference under Section 3 of the Act.

Paragraph XIV refers to the alleged erroneous interpretation made by the Commission of Section 22 of the Act.

The decision of the Commission must be interpreted as a whole. This particular phase of the subject will be considered in argument.

Paragraph XV of the carriers' petition alleges the discrimination between parties. The gravamen of the complaint is that the "carriers are required to discriminate in favor of such persons as contemplate 2,500 miles of travel in one year and are in a position to pay $72 in advance for such transportation." If such a discrimination even existed the carrier is not the proper party complainant. This paragraph raises another important legal issue relating to the power of the legislative branch of the government.

Paragraph XVI protests against any period of experiment in order to test the effect of the order on actual traffic.

Paragraph XVII has to do with the alleged violation of Section 15-A of the Interstate Commerce Act, which

requires the Commission to establish rates that will produce as nearly as possible a rate of return on the value of the property to be fixed by the Commission.

They claim that the present rates fail to produce the return required by statute and that the reduction in the passenger revenue will therefore constitute a violation of the requirements of the Act.

There is a confusion in the minds of the authors of this paragraph.

Section 15-A of the Interstate Commerce Act refers to net revenue, not gross.

It is our claim that the order at issue in this case will increase the net revenues of the carriers and not decrease them. It will initiate a greater volume of traffic and help the commercial world to shake off this paralysis in business that has followed in the wake of the war. The trains and cars and the roadbed are all ready for operation. The cars are almost half empty. Every passenger added means practically a net increase in the revenues of the carriers by the amount of the fare which he pays.

In this paragraph counsel allege in regard to the sixty million dollar loss in their net income: "This estimate was not questioned by the Commission in its findings." The fact is the Commission did not mention this item in any part of their decision. (They do quote from the railroads in a table in the Appendix to the opinion.) The fact that a claim made on the record is not mentioned in the decision, is not a justification for the assertion that the Commission adopted such a claim as correct; in fact, the deduction is usually made by counsel in a case that such an incident is evidence of directly the reverse, that the Court or Commission declined to adopt the figure as correct.

In paragraph XVIII of their petition, carriers again argue that the Commission has adopted 3.6 cents as the standard rate, and that the actual cost of transportation of passengers on the rates established in this order at issue is no less than the cost of passengers using tickets at the standard rate. Further they say: "On the facts as found by the Commission a just and reasonable fare for the holder of a scrip coupon ticket good for ordinary transportation on all trains throughout the United States cannot possibly be less than a just and reasonable fare for the transportation of any other passenger receiving the same service."

If they mean that travel in an ordinary train compels the adoption of the so-called "standard rate" exclusively, then practically all tourists' rates, excursion rates, etc. (and likewise commodity traffic in the freight service), are unreasonably low. Even though two parties are on the same train just as two tons of freight are being hauled in the same train, there are other factors that must be considered in railroad transportation which may justify a lower charge.

Carriers again say in paragraph XVIII of their petition that the Commission, by its decision in Increased Rates, 1920, "established the basic rate of fare of 3.6 cents per mile as the just and reasonable basic rate of fare generally throughout the United States." It will be found that the Commission made no such finding or order in the said case.

Paragraph XIX refers to the credit one railroad company must give another by order of the Commission. This involves one of the important issues which will be discussed later.

Paragraph XX of carriers' petition claims the require-

ment to transport passengers for less than the just and reasonable rate of fare as determined by the Interstate Commerce Commission in the proceedings previously described, constitutes a violation of the Fifth Amendment, and is void, because a passenger may only use the scrip coupon ticket for one trip on that particular railroad issuing the ticket. If we consider the railroads as a whole, as a large system operating under joint arrangements approved by the Interstate Commerce Commission, this is a necessary incident—a detail. If a half a dozen railroads join in the establishment of a through commodity rate on coal or sandstone they would do this very same thing under the same contingencies. One carrier might obtain none of the commodity traffic thereby inaugurated except one haul, and yet the rates would become effective by voluntary action of the railroads or by order of the Commission itself. It cannot be otherwise, as a practical matter, if we are to have joint rates and joint through routes.

Paragraph XXI relates to the authority of the Commission to exempt one carrier from the provisions of the order under consideration where the peculiar circumstances shown to the Commission shall justify such exemption.

Paragraph XXII excepts to the order on the ground that it affects state traffic as well as interstate traffic.

In reviewing the petition of the carriers it will be seen that there are many duplications. In their brief before the lower court these various propositions are again argued in many different ways.

The claims of the carriers are stated at great length under twenty-three sections of their petition, six head-

ings and nine subheadings in their brief. The principal claims can be summarized as follows:

First—That the Commission acted under an erroneous interpretation of the law, in that they considered the congressional act required the establishment of interchangeable tickets at reduced rates.

Second—That the order of the Commission creates an unjust discrimination between passengers, and is therefore unlawful.

Third—That the passenger fares ordered by the Commission are confiscatory, and the said order is therefore void, taking the property of the carriers without due process of law.

Fourth—That the order is void because of the exemptions ordered by the Commission.

Fifth—That the order of the Commission is void because it applies to intrastate commerce.

Sixth—That the order of the Commission is void because it requires one carrier to give credit to another carrier, thereby taking the carriers' property without due process of law.

Seventh—That the order is void because it violates Section 15a of the Interstate Commerce Act.

Eighth—That the order is void because it is experimental.

In addition, there is a general allegation made as to several of the propositions just stated, to the effect that the evidence does not support the conclusions of the Commission.

The lower court sustained the carriers on the first proposition, declined their claim as to the sixth proposition, and did not pass upon the others.

ASSIGNMENT OF ERRORS.

Appellants' assignment of errors is as follows:

The District Court erred:

I. In denying the motion of the United States to dismiss the petition and in not sustaining the motion.

II. In deciding, holding and adjudging as follows:

> Although the carriers opposed any reduction in rates for the scrip coupons below the standard rates, it is clear from the record that the Commission proceeded on the assumption that the spirit and theory of the Congressional amendment required them to order the scrip coupons to be issued at reduced rates, at least in so far as such rates could not be deemed confiscatory. There is no finding in the record that would indicate that the Commission, if it had exercised an independent judgment apart from what it conceived to be the plain spirit and theory of the amendment, would have ordered the scrip coupons to be issued at reduced rates.

III. In deciding, holding and adjudging as follows:

> The only finding of the Commission that could possibly be relied upon as indicating that the Commission exercised an independent judgment is the statement in the majority report that "in addition to the

obvious spirit of the law, the record warrants the view that a coupon ticket at a reasonably reduced fare should be established, at least for an experimental period." But this finding is followed by the statement that "in no other way can the apparent purpose of the law be given practical effect." It would seem fairly plain, therefore, that the furthest the Commission goes in its finding is to conclude that the record might justify the issuance of coupons at reasonably reduced rates for an experimental period; but there is nothing to indicate that the Commission, if it had felt free to exercise its own judgment, would have assumed the responsibility for establishing the reduced rate, even for an experimental period.

IV. In deciding, holding and adjudging as follows:

It is not entirely clear whether the majority of the Commisison acted under an interpretation of the amendment that it was mandatory upon them so to reduce the rates for interchangeable scrip coupon tickets, or upon an assumed desire of the Congress, though not expressed by the amendment in mandatory form, that they should so do.

V. In not sustaining the order of the Interstate Commerce Commission.

VI. In not dismissing the petition.

VII. In issuing the permanent injunction.

(The National Council of Traveling Salesmen's Association, *et al.*, added the following to the assignments made by the Government and by the Commission: The District Court erred: (V) In deciding, holding and adjudging as follows):

That either "the Commission acted upon a different interpretation of the amendment" and thus that "an error of law was the basis of its action and order" or that it "based its conclusions not upon its own independent judgment, but upon what it believed to be the spirit and purpose of the act, which, if it means something other than a sound interpretation of the act, must mean some supposed desire of the Congress," and thus "acted contrary to law in abdicating the functions vested in it."

"In either case its orders is without warrant of law and for this reason it must be annulled."

The carriers have made no appeal from any portion of the decision of the lower court.

ARGUMENT.

The order at issue in this proceeding was made by the Interstate Commerce Commission, directing Class I railroads (with certain exceptions specifically named) to sell nontransferable, interchangeable scrip coupon tickets (hereinafter generally called scrip books), of 2,500 miles each, at a discount of 20 per cent below the fares on ordinary one trip tickets, the same being good for one year from date of purchase. Various rules and regulations were specified, concerning which there seems to be no substantial differences between the parties.

Many objections, which we have outlined in the Statement of the Case, were urged against the order by counsel for the railroads, the petitioners below.

The carriers were sustained by the lower court on one proposition only; and that related in substance to the alleged misinterpretation by the Commission of the law under which the order was issued.

The carriers gave chief attention in their brief and argument before the lower court to the issues relating: first, to the alleged discrimination created by the order at issue, as between passengers holding the scrip books, and those paying the ordinary fares; and second, to the

alleged confiscatory character of the order of the Commission.

Counsel for the railroads have made two basic mistakes of fact which permeate their entire argument.

We shall consider in argument: First, the proposition on which the carriers have been sustained by the lower court; Second, the two basic propositions of fact concerning which the carriers are in error; and then we shall proceed with a discussion of the other issues involved.

I. THE COMMISSION CORRECTLY INTERPRETED THE LAW UNDER WHICH THE ORDER AT ISSUE WAS MADE.

The lower court bases the injunction order upon what it conceives to be a misinterpretation by the Commission of the Amendment to Section 22 of the Act to Regulate Commerce, under which the Commission rendered the decision at issue.

The Court rests its conclusion enjoining this order of the Interstate Commerce Commission, upon eight lines in the decision of the Commission. The only places in which the Commission makes reference to the "spirit or purpose of the law" are in the five lines quoted by the court, and in one other passage which contains one clause which the Court uses. (Commission's decision, 209.) At no other place in the entire decision of the Commission is there any reference to this so-called purpose or spirit of the law.

There is much force to the comments of the Commission as to the intent of Congress; but we believe a fair review by this court of the record and decision of the Commission will not warrant the contention that the Commission in this proceeding under investigation, yielded its judgment as to what was the reasonable rate to any other tribunal, knowing as it did, the requirement

of the law that the discretion rested with the Commission.

We feel that it would hardly be proper to depend upon a few selected passages of the Commission's decision to determine what it had in mind, and upon what it based its conclusions. It is necessary for us to consider the decision of the Commission as a whole, in order to reach a fair determination of this issue.

From the few lines referred to above the Court concludes that if the Commission acted upon some other theory than that the determination of what should be 'the just and reasonable rates for such coupons is placed entirely upon the Commission," then "an error of law was the basis of its action and order." But if the Commission based its conclusion upon 'some supposed desire of the Congress, it acted contrary to law in abdicating the functions vested in it.' *New York Central R. Co. et al. v. U. S.*, 288 Fed. 951, 953, 954.

Let us consider, first, whether the Commission interpreted the Act as mandatory or not; and second, did the Commission undertake to assume the responsibility put upon it by the law and to decide the issue, or did it abdicate its functions?

(1) What was the Commission's interpretation of the law?

It would seem that if the court were right in its interpretation of the Act, then the Commission had a correct conception of the law, for at the very beginning of its decision the Commission uses language concerning the Act, which states in substance precisely the same interpretation of the statute which the court itself declared in its decision. These two passages evidence the

fact that the Court and the Commission had the same conception of just what the law required.

The Court says:

> "The fair and natural interpretation of the language used by the Congress makes mandatory the issuance of such coupons at just and reasonable rates; but the ultimate, if not the original, determination of what shall be just and reasonable rates for such coupons is placed entirely upon the Commission." (*Id.*, 953.)

The Commission says:

> "The act is mandatory in that it directs us, after notice and hearing, to require each carrier by rail subject to the act to issue 'interchangeable mileage or scrip coupon tickets.' It is discretionary in that we may prescribe either an interchangeable mileage ticket or a scrip coupon ticket. It is also left to our judgment to determine after notice and hearing the 'just and reasonable rates' at which the form of ticket prescribed shall be issued." (Com. Dec. p. 202.)

The Court says:

> "If, therefore, the Commission acted upon a different interpretation of the amendment, an error of law was the basis of its action and order." (*N. Y. C.* v. *U. S.*, *supra*, 953.)

But we have just seen that the Commission did not make this error of law, for it adopted precisely the same interpretation of the law which the court itself adopts

(2) What course did the Commission follow as to investigating and deciding for itself what were just and reasonable rates? Did it abdicate the function vested in the Commission?

At the very beginning of the investigation the Commission issued a notice of a public hearing, and the sec-

ond interrogatory proposed for consideration at that hearing was:

> "What rate or rates shall be established as just and reasonable for each or either form of ticket?" (Commission's decision, 201.)

Counsel for the carriers make claim that there were no findings of fact made by the Commission in support of its decision, and that there was no substantial evidence of record in support of the same. This same thought is suggested in the second observation by the Court quoted above, and again where the Court says that there is no finding in the record that would indicate the Commission, acting independently, would have ordered the scrip coupons at reduced rates.

It is true that the Commission states the facts cited by the carriers tending to support their claims; but it is also true that the Commission states the facts which are opposed to the claims of the carriers, and which offset those presented by the railroads sufficient to justify the decision of the Commission. A few of the latter group will be gathered together for convenient reference; it being remembered that the relative weight to be attached to these as compared to the facts adduced on the other side, rests with the Commission and not with the Court.

Speaking of the claims of the traveling men, the Commission says:

> "All urge that the tickets should be sold at 33⅓ per cent less than the standard fare and that they would stimulate travel to such an extent as to offset any decrease of revenue that might result from the reduction in the fare. They say that the stimulus from the use of such a ticket would in all probability result in increased revenue. They also urge that salesmen would by their sales stimulate the movement

of freight traffic and thereby augment freight revenue." (Com. Dec., p. 206.)

In its concluding paragraphs the Commission says:

"It is a well-recognized rule in trade and commerce that, other things being equal, as the price of an article is lowered the sales increase. And the fact that for many years prior to Federal control carriers voluntarily sold mileage books at discounts ranging from 10 to 33⅓ per cent is not without significance. That commutation and excursion fares create traffic is conceded by carriers. That some additional traffic would be created by a scrip ticket at reduced fares may fairly be assumed, although it is impossible to determine how much. Many unused coupons would not be redeemed while others which remained in the book near the end of the year or season would undoubtedly be used for passenger travel that would not otherwise occur. A scrip ticket at reduced fares could not be justified solely upon the theory that the cost per passenger-mile might thereby be reduced, although it is apparent that anything that will tend to cause a fuller utilization of passenger-train facilities without overcrowding will also tend to reduce the average cost per passenger-mile." (Com. Dec., 209.)

After reviewing the evidence, the Commission makes the following unqualified and clear finding of fact:

"We further find that the rates resulting from that reduction will be just and reasonable for this class of travel." (*Id.*, 210.)

We submit that there has not been an erroneous interpretation of the Act, and that the Commission did not abdicate.

As to whether the evidence adduced is sufficient to warrant the decision announced is not for the Court to determine.

WEIGHT OF EVIDENCE.

In discussing the opinion of the Commission, counsel for the carriers have urged as to many of their propositions, that there were no substantial findings of fact made by the Commission in support of the conclusions announced. That is also the burden of a large portion of the Court's opinion. As to orders of this character the Commission is not required by statute to make detailed findings in support of their conclusions. The Commission has announced certain specific conclusions which are sufficient to support its order. If there was no substantial evidence in support of those conclusions, of course the order should fail. But if there was such evidence, the order should stand. In considering the record it is not within the province of the court to weigh the evidence or to consider the wisdom of the order entered. (New England Divisions Case—*Akron, etc., R. Co.* v. *U. S.*, ... U. S. ...., 67 L. ed. 308, 316; citing *Manufacturers R. Co.* v. *U. S.*, 246 U. S. 457; *Skinner, etc.*, v. *U. S.*, 249 U. S. 557; *Seaboard Air Line* v. *U. S.*, 254 U S. 57.)

The probative weight attached to conclusions reached by the Commission was expressed by Mr. Justice Lamar in another proceeding, when an order of the Commission was under attack, as follows:

> The value of evidence in rate proceedings
>
> "necessarily varies according to circumstances but the weight to be given it is peculiarly for the body experienced in such matters and familiar with the complexities, intracacies, and history of rate making in each section of the country. * * *
>
> "It is true that the old low locals from Mobile (west) to New Orleans were maintained, while those

from New Orleans (east) to Mobile were raised is not conclusive against the reasonableness of new tariff put in force in 1907. But it was a fact tending to support the conclusion, unless the difference was shown to have been warranted by proper rate-making rules. * * *

"The order of the Commission restoring a local rate that had been in force for many years, and making a corresponding reduction in the through rate was not arbitrary, but sustained by substantial, though conflicting evidence. The courts cannot settle the conflict, nor put their judgments against that of the rate-making body, and the decree is reversed." *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 57 L. ed. 431, 436, 437.

In *Interstate C. C.* v. *Union P. R. Co.*, 222 U. S. 541, the Court stated:

"In determining these mixed questions of law and fact, the Court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. * * * Its conclusion, of course, is subject to review, but, when supported by evidence, is accepted as final; not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof, but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order." (*Id.*, 548.)

Under subsequent headings in this brief we shall have occasion to review some of the essential facts tending to support the conclusions of the Commission.

II. THERE IS NO GOVERNMENT ESTABLISHED PASSENGER FARE OF 3.6 CENTS PER MILE.

Counsel for the railroads say in their brief before the lower court:

> "As stated above, by its decision in Increased Rates, 1920 (58 I. C. C. 220), the Commission had established 3.6 cents per mile as the just and reasonable rate for the transportation of passengers throughout the United States. In Reduced Rates, 1922 (68 I. C. C. 676), the Commission, though importuned to reduce passenger fares, reaffirmed its decision that 3.6 cents per mile was just and reasonable for the transportation of passengers." Carriers' Brief, p. 6.

This proposition is repeated in almost that same phraseology 15 times in the carriers' petition and brief before the lower court.

The carriers have fallen into an error on this proposition. This constant reference by counsel to the establishment by the Commission of a 3.6 cents fare in 1920 is fallacious in every instance where stated.

In the decision entitled "*Increased Rates, 1920*," *supra*, to which the carriers refer, the Commission authorized an increase of 20 per cent in all passenger fares, and the term "passenger fares" was specifically interpreted to mean not only the so-called standard local or interline fares, but also excursion fares, convention fares, special

fares, commutation fares, etc. Consequently, instead of establishing the rate of 3.6 cents the Commission in fact established maximum fares for local, interline, excursion, convention and other special occasions, for commutation and other multiple forms of tickets, extra fares on limited trains and club car charges. (*Id.*, 242.)

The conclusions of the Commission in the said case as to passenger fares were stated in the following language:

> "We conclude that increases as indicated next below may be made by all steam railroads subject to our jurisdiction serving the territory embraced in the groups hereinbefore designated.
>
> "1. All passenger fares and charges may be increased 20 per cent. The term 'passenger fares,' may be considered to include standard local or interline fares; excursion, convention, and other fares for special occasions; commutation and other multiple forms of tickets; extra fares on limited trains; club car charges.
>
> "2. Excess baggage rates may be increased 20 per cent provided that where stated as a percentage of or dependent upon passenger fares the increase in the latter will automatically effect the increase in the excess-baggage charges.
>
> "3. A surcharge upon passengers in sleeping and parlor cars may be made amounting to 50 per cent of the charge for space in such cars, such charge to be collected in connection with the charge for space, and to accrue to the rail carriers.
>
> "4. Milk and cream are usually carried in passenger trains, and the revenue therefrom is not included in freight revenue. Rates on these commodities may be increased 20 per cent." (*Id.*, 242.)

The average fare from all revenue passenger traffic for the year 1919, which was available at the time of the decision of the Commission in the case just cited, amounted to 2.54 cents. In 1918, this was 2.42 cents; and in 1920, it was 2.75 cents. (Basic figures are given

in the decision cited, Reduced Rates, 1922, 68 I. C. C. 676, 686, 727.)

Counsel for the railroads further say that in Reduced Rates, 1922, *supra,* the Commission though importuned to reduce passenger fares reaffirmed its decision that 3.6 cents was "just and reasonable for the transportation of passengers." That statement is also erroneous. The Commission recited extensive statements of fact, but made no finding as to what would constitute reasonable fares in the said case.

III. THE FARES ORDERED BY THE COMMISSION WILL BE HIGHER THAN THE AVERAGE FARE PAID ON THE REMAINING PASSENGER TRAVEL OF THE UNITED STATES.

The claim is made by counsel for the railroads that the "established just and reasonable passenger fare" in the United States is 3.6 cents per mile, that this is the prevailing regular fare in all parts of the country, and that the order of the Commision would produce an exceptional class paying much less than practically all the rest of the community.

The law is described prohibiting any discriminations:

> "From time to time since the passage of the original Commerce Act in 1887, Congress has by repeated enactments and the most emphatic language prohibited, with severe penalties, granting discriminatory passenger rates under any terms or circumstances to any persons whatsoever." (Carriers' Brief before the lower court, page 4.)

Then we are told that the only persons for whom exceptions to these prohibitions have been allowed are ministers of religion, indigent persons hauled at the behest of municipal governments, and inmates of national homes for soldiers and sailors. The impression this recital leaves on one's mind is that not all, but practically all the people of the United States, with the few exceptions

of ministers, paupers, sailors and soldiers, must pay and actually do pay the full 3.6 cents.

The carreirs claim that the particular type of scrip book here ordered will affect travel now producing approximately $300,000,000 annually. If that be true it can be mathematically demonstrated that the reduced fare paid by those who will use these scrip books is higher than the average passenger fare paid by the remaining 75 per cent of the travel in the United States. In other words, 75 per cent of the passenger travel today is on a lower plane, on the average, so far as charges are concerned, than this decision of the Interstate Commerce Commission orders for those who must travel at a minimum of 2,500 miles, which is approximately seven or eight times the average travel per inhabitant of the remaining people in the nation. This is a fact based upon statistics of record and in the decision as follows:

Dividing $300,000,000 by 3.6 cents, we have the total passenger miles thereby affected of 8,333,000,000. The passenger miles for the first six months of 1922 were 16,487,000,000 (Ante, p. 10), and multiplying this by 2 makes the total of 32,974,000,000 for the year. (This is the method adopted by the carriers to secure the estimate for the year 1922.) Subtracting the 8,333,000,000 from the total for the year leaves 24,641,000,000 passenger miles not affected by the Commission's order. (Please note, while 70 per cent of the revenue is not affected by the order, approximately 75 per cent of the travel—measured in passenger miles—will be unaffected; 24,641,000,000 compared to 32,974,000,000.)

It is stated by the railroads that the total passenger

revenue for the year 1922, was approximately $1,000,000,000. (Carriers' Brief, page 85.) Subtracting the $300,000,000, which the railroads say will be affected by the Commission's order, leaves $700,000,000 unaffected. Dividing this revenue of $700,000,000 by the passenger miles not affected by the order (24,641,000,000) produces 2.84 cents as the average revenue per passenger mile of the 75 per cent of the travel in the United States unaffected by the order. This is lower than for the man who purchases a scrip book and pays the fare on the ordinary one trip ticket of 3.6 cents, less the 20 per cent discount, or 2.88 cents per mile.

The foregoing computations are based upon the carriers' own figures and estimates, not ours. Either they are sound in every respect or the carriers' estimates are wrong.

It is a striking fact that 75 per cent of the travel of the United States is on a lower plane on an average today than the fares ordered by the Commission at issue in this proceeding. And yet we are told that this order creates a preferred class and that those people purchasing the scrip book are going to have a lower charge than the rest of the community obtains. There is an unfortunate confusion of terms here. Instead of using the phrase, "standard ordinary" fare, we ought to have used some such clause as the maximum or the highest charges for passenger travel. The bulk of this travel that has to pay the highest fare is made by the commercial traveling salesmen, these people who are so vitally necessary to American industry; and in order to secure the fare suggested, they must travel a minimum which is seven or eight times the distance traveled by the average person in the United States, as will be demonstrated on a subsequent page.

There is no segregation of costs in the entire record to show how much of this 2.88 cents is profit, and how much of the 2.84 cents is profit.

This computation demonstrates that instead of it being the exceptional and the few who pay less than 3.6 cents, the bulk of the traffic of the country today is hauled at very substantially less than 3.6 cents per mile.

The expressions "standard fare" and "regular fare" that the ordinary traffic pays are misnomers. The average fare, the normal fare, in this country on which 75 per cent of the travel moves today, is less than 2.9 cents per mile.

It is true that widespread discriminations occasioned the enactment of the Interstate Commerce law, and its amendments. These discriminations existed in the freight traffic as well as the passenger traffic. After the passage of these laws, have we adopted a single ton mile revenue in the United States for the freight traffic? Not at all. Commodity rates exist in all parts of the nation, varying with the character of the tonnage, the density and volume of the tonnage, and many other factors.

When the Commission granted certain percentage increases in freight rates in 1920, the resulting rates did not become at that time a hard and fixed schedule, which must be accepted as just and reasonable on all freight traffic during the ensuing two years. If that were true, the Commission could be excused from further performance of their duties so far as hearing rate cases is concerned. As a matter of fact, the Commission has constantly received applications, taken evidence thereon, and rendered decisions making both advances and reductions in freight rates throughout all parts of the United States.

Where the railroads or the Commission fail to establish commodity rates fairly reflecting the needs of the country, both the public and the railroads suffer. It is right that we should have these commodity rates for the best interest of the entire community. And it is right that we should have our passenger fares adjusted to fairly meet the needs of the public.

IV. PASSENGER FARES MAY BE ORDERED VARYING IN ACCORDANCE WITH THE CIRCUMSTANCES AND CONDITIONS SURROUNDING THE TRAFFIC INVOLVED.

Counsel for the railroads state the following as their leading proposition before the lower court:

> **"In the respect that the Commission's order is an arbitrary and unreasonable discrimination in fares between scrip coupon passengers and regular fare passengers, it is beyond the power of the Commission and lacks due process of law."** (Carriers' Brief, 27.)

In support of this doctrine the carriers cite as their leading case the Lake Shore decision. (*Lake Shore & Mich. So.* v. *Smith*, 173 U. S. 684.)

Our reply to carriers' proposition will be in substance:

1. A carrier cannot be heard in this Court to complain of the unconstitutionality of an Act, or of an order thereunder, because of discriminations created among the patrons of the railroad.

2. The Lake Shore Case and other decisions cited by the carriers before the lower court are not controlling on the issues in this proceeding.

3. The weight of authority and the best interests of the community support the validity of the Commission's order at issue in this proceeding.

We shall discuss these propositions in the order named.

1. A CARRIER CANNOT BE HEARD IN THIS COURT TO COMPLAIN OF THE UNCONSTITUTIONALITY OF AN ACT, OR OF AN ORDER THEREUNDER, BECAUSE OF DISCRIMINATIONS CREATED AMONG THE PATRONS OF THE RAILROAD.

The railroad is not the injured party in any such discrimination as that described in the carriers' proposition quoted previously; and the railroad therefore can not be heard in this case to advance such an argument. This principle has been constantly stated and reiterated in the decisions of this Court. Various cases will be described.

In *Arkadelphia Milling Co.* v. *St. Louis S. W. Ry. Co.*, 249 U. S. 134, it was claimed that the establishment of lower than standard rates on rough material going to companies later shipping finished products created an unjust discrimination against shippers who did not ship certain specific percentages of the finished product. The benefit of the lower rough material rates accrued only to those shippers who handled at least a certain percentage of the products manufactured from the rough material, over the line of the same carrier.

The district court sustained the defense upon the authority of the Lake Shore Case, *supra*, and *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79.

The Supreme Court, however, stated that in its opinion

"the district court erred in its ruling. The rough material rates were but parts of a general schedule that covered a wide field. This schedule was established in the exercise of the legislative authority of the state, and could not be set aside by the court on the ground of discrimination unless it amounted to a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment.

"But there is nothing to show that the rough material rates wrought any discrimination against the

railway companies. They were applicable upon all railways alike. If there was—not in the least intimating that there was—undue discrimination as against small shippers or those who had no occasion to obtain transportation for the manufactured product over the line of the same carrier, this was not a matter of which the railways could complain. It is most thoroughly established that before one may be heard to strike down state legislation upon the ground of its repugnancy to the Federal Constitution he must bring himself within the class affected by the unconstitutional feature. *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 576; *Mallinckrodt Chemical Works* v. *Missouri*, 238 U. S. 41, 54; *Cusack Co.* v. *Chicago*, 242 U. S. 526, 530.

"*Lake Shore & Michigan Southern Ry. Co.* v. *Smith*, 173 U. S. 684, did not set aside this established principle. The discrimination in favor of certain patrons, there referred to, was laid hold of rather as showing the unreasonable character of the regulation. The authority of that case is not to be extended. *Louisville & Nashville R. R. Co.* v. *Kentucky*, 183 U. S. 503, 511; *Pennsylvania R. Co.* v. *Towers*, 245 U. S. 6." (*Id.*, 148, 149.)

This same doctrine has been recognized repeatedly in the decisions:

"So far as the present attack is founded upon the commerce clause and the Act to Regulate Commerce, it is sufficient to say that the judgment under review was not based upon a claim arising out of interstate commerce, and hence plaintiff in error does not bring itself within the class with regard to whom it claims the act to be in this respect repugnant to the Constitution and laws of the United States. *Seaboard Air Line R. Co.* v. *Seegers*, 207 U. S. 73, 76; *Tyler* v. *Judges*, 179 U. S. 405, 409; *Hooker* v. *Burr*, 194 U. S. 415, 419; *Hatch* v. *Reardon*, 204 U. S. 152, 160; *Southern R. Co.* v. *King*, 217 U. S. 524, 534; *Standard Stock Food Co* v. *Wright*, 225 U. S. 540, 550; *Rosenthal* v. *New York*, 226 U. S. 260, 271.

Farmers & M. Savings Bank v. *Minnesota*, 232 U. S. 516, 530; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544." (*M. K. & T. R. of Tex.* v. *L. C. Cade*, 233 U. S. 648.)

"The argument based upon such discrimination, so far as it affects employes by themselves considered, cannot be decisive; for it is the well-settled rule of this court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of. *Southern R.* v. *King*, 217 U. S. 524, 534; *Engel* v. *O'Malley*, 219 U. S. 128, 135; *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540, 550; *Yazoo & Mississippi Valley R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217, 219; *Rosenthal* v. *New York*, 226 U. S. 260, 271; *Darnell* v. *Indiana*, 226 U. S. 390, 398; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544; *Missouri, Kansas & Texas Ry.* v. *Cade*, 233 U. S. 642, 648." (*Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 576.)

In the Burnham, Hanna, Munger Case, the *Interstate Commerce Commission* v. *Chicago, R. I. & P. et al.*, 218 U. S. 88, the carriers attempted to set up alleged discriminations against certain trade centers that would be caused by the order at issue. The Court was willing to listen concerning the effect of the order on railroad revenues, but declined to consider objections made by the railroads because of the effect on shippers and trade centers, saying:

"We have said several times that we will not listen to a party who complains of a grievance which is not his. *Clark* v. *Kansas City*, 176 U. S. 114, 118; *Smiley* v. *Kansas*, 196 U. S. 447." (*Id.*, 109.)

Counsel for the railroads in this case recognized that they would be subject to the same ruling relative to a claim of discrimination were it not for the claim they allege as to the confiscatory character of the schedule; in fact, proof of the confiscatory or non-compensatory

character of the rates established becomes a necessary part of the carriers' case in this proceeding, as expressed by counsel. After discussing the decision in *Arkadelphia Co.* v. *St. Louis S. W. Ry. Co., supra,* counsel then proceed as follows:

> "This case is no authority against our contention. When the entire schedule of rates had been sustained as not confiscatory, and hence not denying the railroads due process of law, of course a railroad could not raise the point that a particular class of shippers was discriminated against and was denied the equal protection of the laws. That is a question which the shipper who was hurt must raise." (Carrier's Brief, 61.)

These comments of counsel for the railroads on the Arakadelphia case are very significant, and almost determinative in the disposition of the present proceeding.

This makes the controlling factor not the allegation of discrimination, but the non-compensatory or confiscatory character of the rates. This issue will be discussed under a separate heading.

2. THE LAKE SHORE CASE AND OTHER DECISIONS CITED BY THE CARRIERS BEFORE THE LOWER COURT ARE NOT CONTROLLING ON THE ISSUES IN THIS PROCEEDING.

The Michigan mileage book case to which we refer as the Lake Shore Case, was quoted at great length and relied upon by counsel for the carriers in their brief before the lower court as the leading case on the issues here involved. (Carriers' Brief, 37-43-44-52-53-57-60-62.)

The Lake Shore decision is not in point. The court there held that after the legislature had established by statute one maximum rate on passenger traffic, the legislature could not proceed to make exceptions. Congress

has never established any maximum passenger fare effective throughout the United States; nor has the Interstate Commerce Commission.

Mr. Justice Peckham defined the issue in the Lake Shore case in the following language:

> "The question is presented in this case whether the legislature of a state, having power to fix maximum rates and charges for the transportation of persons and property by railroad companies, with the limitations above stated, and having power to alter, amend or repeal their charters, within certain limitations, has also the right, after having fixed a maximum rate for the transportation of passengers, to still further regulate their affairs and to discriminate and make an exception in favor of certain persons, and give to them a right of transportation for a less sum than the general rate provided by law." *Lake Shore Case, supra,* 690.

This same thought is repeated several times in the decision.

The declaration of the Court was contingent on there being such a general rate established by the state; and that contingency has been restated in subsequent decisions interpreting the Lake Shore Case.

The Court in restating the principle of the Lake Shore case in *Pa. R. Co.* v. *Towers,* 245 U. S. 6, said:

> "This court held that a maximum rate for passengers having been established that rate was to be regarded as a reasonable compensation for the service and that the fixing of the less rate to particular individuals was an arbitrary exercise of legislative power and an unconstitutional interference with the business of the carrier, the effect of which was to violate the provisions of the 14th Amendment to the Federal Constitution." (*Id.,* 10.)

Counsel for the railroads in this proceeding, realizing the necessity to come under the rule of the Lake Shore

case, have stated and restated the following claim: The Interstate Commerce Commission "established as the just and reasonable rate for the transportation of passengers over the lines of your petitioners and other carriers the rate of 3.6 cents per mile, which rate of fare accordingly became the established just and reasonable rate for this service." (Carriers' Petition, 11.)

Counsel for the railroads have made a fundamental mistake on this phase of the case. The claim that the Commission had established a passenger fare of 3.6 cents which was effective throughout the United States at the time the order at issue was rendered, is erroneous, as we have previously shown.

On June 24, 1918, the Director General of Railroads ordered the so-called "minimum fare" of 3 cents per passenger mile, at the same time cancelling mileage book rates generally. However special fares were continued or reinstated almost immediately, bringing the average down to the figures previously quoted. Government control ceased February 29, 1920.

August 25, 1920, the Commission rendered a decision in what is called *Ex Parte* 74, or "Increased Rates, 1920," *supra*. The Commission did not order a maximum fare or a minimum fare of 3.6 cents per passenger mile as counsel for the railroads declare so constantly, repeating the claim over and over again in their petition and brief before the lower court. It is true that they authorized certain increases in passenger fares, but the percentage of increase was made applicable not only to the 3 cent fare, but to the existing excursion, convention and other fares, commutation and other multiple forms of tickets, extra fares on limited trains, club car charges, also excess baggage rates; also there was an advance of 50 per cent on surcharges in

sleeping and parlor cars. At no time has the Commission singled out the 3.6 cent fare, "establishing that as the just and reasonable passenger rate" throughout the United States. Under a former heading we have reproduced in full the conclusions of the Commission in that decision on the subject of passenger fares.

A reading of this will show nothing approaching the establishment of a single maximum passenger fare similar to the action of the Michigan State Legislature.

It might be correct to say that the average revenue the Commission approved was 2.54 cents per passenger mile (for the previous year) plus 20 per cent, or approximately 3.06 cents. That decision was rendered in 1920. It happens that the average for the first six months of 1922 was 3.03 cents. But the Commission did not adopt that flat figure, for there were very wide variations in the fares approved by the Commission, which produced that average.

There was a great volume of these passenger charges officially recognized and ordered by the Commission in the paragraphs quoted which were below the 3 cent level. They ranged from 2 cents to 3 cents per passenger mile. At the time of this decision the Commission had before it, as previously stated, the returns for 1919 and previous years.

The figures for 1918 and 1919, are contained in the decision of the Commission in the case entitled, Reduced Rates, 1922, 68 I. C. C. 676. Dividing revenue passenger miles (p. 727) into passenger revenue (p. 686), it will be noted that the average revenue per passenger mile in 1919 was 2.54 cents; and in 1918, 2.42 cents. This will demonstrate the wide range of passenger fares below the 3 cent basis; and the Commission's order in 1920 as

above quoted, authorized the 20 per cent increase in all of those fares, establishing the resulting figures as the maximum rates on passenger traffic. That decision was rendered July 29, 1920, and was effective the latter part of August, 1920. The decision in the case entitled Reduced Rates 1922, being Docket No. 13293, 68 I. C. C. 676, was rendered May 16, 1922. In this last case, the Commission presented an extended discussion of the passenger revenues, but it made no order in regard thereto.

Instead of the present order constituting an exception to a single mileage fare throughout the United States of 3.6 cents, we find ourselves confronted with an order of the Commission which established maximum excursion, convention, standard, local and interline fares and commutation and other multiple forms of tickets throughout the United States, 20 per cent greater than those prevailing at the time of the decision.

Nationally, the situation is very analogous to the condition existing in the State of New Hampshire reported in *State* v. *Railroad*, 77 N. H. 425. In this case there was an issue as to the constitutionality of the statute establishing 500-mile mileage books at the rate of 2 cents a mile, good for transportation of bearer over state railroad lines in the State of New Hampshire. The decision of the Court in the Lake Shore Case was relied upon as the controlling precedent against the validity of the statute under consideration. However, the New Hampshire court held that the circumstances were not the same, the language of the court being as follows:

> "From what has been said it follows that the case *Lake Shore etc. Ry.* v. *Smith*, 173 U. S. 684, relied upon by the defendants, is not now in point. That case does not hold that a legislative enactment fixing a maximum mileage rate is illegal, but expressly

admits the existence of such power, citing cases some of which are hereinbefore referred to. In that case, as stated in the opinion (p. 690), the question presented was 'whether the legislature of a state, having power to fix maximum rates and charges for the transportation of persons and property by railroad companies * * * has also the right, after having fixed a maximum rate for the transportation of passengers, to still further regulate their affairs, and to discriminate and make an exception in favor of certain persons, and give to them a right of transportation for a less sum than the general rate provided by law' and the point decided is expressed as follows (p. 696): 'The legislature having fixed a maximum rate at what must be presumed, *prima facie,* to be also a reasonable rate, we think the company then has the right to insist that all persons shall be compelled to pay alike—that no discrimination against it in favor of certain classes * * * shall be made by the legislature.'

"It is not alleged in the instant case that the legislature has fixed any maximum rate which must *prima facie* be considered reasonable. In fact, the legislation as to mileage tickets is understood to be the only instance of a legislative attempt to fix a rate. *Clough* v. *Railroad, ante,* 222, 232. So far as the legislature has acted, two cents a mile is the maximum rate. If that is a reasonable rate, there is no discrimination. If it is unreasonable, confiscatory, the defendants have a remedy upon proof of the fact. As the record is now presented, it is unnecessary to further consider the federal case cited which binds this court so far as it correctly declares the federal law as now expressed." (*Id.,* 429, 430.)

In view of the error on the part of counsel as to the existence of the nationally established fare of 3.6 cents per mile, and the resulting mistake in attempting to rely on the Lake Shore decision as a precedent, there is little occasion for further consideration of the Lake Shore Case.

However, such constant reference has been made to the decision by counsel, that we feel constrained to further discuss various other phases of this decision.

The Lake Shore case involved a law which is distinguishable from the order of the Commission now under consideration for the following reasons, in addition to those basic differences previously stated:

First: The Michigan act provided for the establishment of mileage books, while the present order concerns scrip coupon tickets. These two have certain essential characteristics which are similar; on the other hand, the scrip book is different from the mileage book.

It was found that the scrip book had all the advantages of the mileage books; and certain other practical difficulties which would arise from the use of an interchangeable mileage ticket will not arise from the use of an interchangeable scrip-coupon ticket. (Com. Dec., 202.) Illustrating this difference between the mileage book and scrip book, we cite the following extract from the brief filed on behalf of all the railroads before the Interstate Commerce Commission, this extract being a statement made before the House of Representatives by Representative Huddleston, as appearing on page 10,455 of the Congressional Record of June 29, 1923:

> "I suppose the committee thought the commercial travelers were easy to fool, for they amended the bill by inserting the language 'or scrip coupon tickets' after the mileage-book phrase. This was a complete change in the purpose of the bill, for a scrip coupon ticket is as much like a mileage book as a Kentucky saddle horse is like a spotted bull. They have no relation to each other. The mileage book is composed of units each of which is good for a mile travel. A scrip coupon ticket is composed of units to be used in place of money to purchase tickets." (Br. of Carriers, p. 83.)

The carriers have scrip books in effect today. This is shown on the record before the Interstate Commerce Commission at pp. 91 and 139. (Same brief, p. 16.) It is further shown that only 1 per cent of the carriers' passenger revenues are derived from these scrip books which are currently in use. These were originally "established by the director general and were perpetuated by the carriers after Federal control partly to relieve the congestion at ticket offices in the larger cities, and partly to take the place of the mileage book and thus afford the public the convenience of boarding trains for short trips without the necessity of purchasing a ticket at the ticket office for each trip." (Commission decision page 205.)

At the time of the Commission's decision these scrip coupon tickets, in denominations of $15, $30 and 90, sold at the standard fare and were interchangeable among practically all carriers by rail, except electric and short line carriers. (Com. Dec., 205.) The Commission's order in this proceeding also excepts the electric and short line carriers.

Second: The Lake Shore case extended the time during which the tickets should be in force for a period of two years; while the present order is limited to one year.

Third: The Michigan statute permitted all members of the family to use the mileage book; while the Commission's order in this case makes no such broad extension of the use of the tickets.

Fourth: The Michigan statute provided a different basis for northern and southern Michigan; while the present order makes no classification geographically or territorially, but applies the 20 per cent to existing fares as they are adjusted in the different parts of the country.

Fifth: The Michigan statute caused a reduction from

the so-called standard fare of 33⅓ per cent; while the order at issue in this proceeding involves a reduction of 20 per cent.

Sixth: The record so far as shown in the decision in the Michigan case, evidenced an exception, a lower charge for the special class described than for the rest of the community; and that special rate was 33⅓ per cent below what all the rest of the community paid; whereas the record in this case, as we have shown previously, demonstrates that 75 per cent of the travel of today is being carried at a lower rate, on an average, than the one ordered by the Commission, and consequently the order does not create an exception analogous to the circumstances in the Lake Shore case.

It would seem that the state legislature of Michigan in allowing the ticket to be used by the entire family and to last for two years, did in fact fail to create a fair, just classification.

That some of the items of distinction listed above were considered of importance by the Supreme Court in reaching its conclusion in the Lake Shore case, *supra,* is evidenced by the following extracts from the Court's decision:

> "It assumes to regulate the time in which the tickets purchased shall be valid and to lengthen it to double the period the railroad company has ever before provided. It thus invades the general right of a company to conduct and manage its own affairs, and compels it to give the use of its property for less than the general rate to those who come within the provisions of the statute, and to that extent it would seem that the statute takes the property of the company without due process of law. *Id.* 691.
>
> "The act also compels the company to carry, not only those who choose to purchase these tickets, but

their wives and children, and it makes the tickets good for two years from the time of the purchase. If the legislature can, under the guise of regulation, provide that these tickets shall be good for two years, why can it not provide that they shall be good for five or ten or even a longer term of years?"

Both factors—the number of people who were to use the ticket, and the length of time it was in force—seemed to impress the Court.

"Regulations for maximum rates for present transportation of persons or property bear no resemblance to those which assume to provide for the purchase of tickets in quantities at a lower than the general rate, and to provide that they shall be good for years to come. This is not fixing maximum rates, nor is it proper regulation. It is an illegal and unjustifiable interference with the rights of the company." (*Id.* 694.)

This Court has held the decision in the Lake Shore case shall not be extended beyond the circumstances in that case (*Arkadelphia Co.* v. *St. L. S. W.*, 249 U. S. 134; *Pennsylvania R. Co.* v. *Towers*, 245 U. S. 6), and the Court has also held that certain doctrines announced in the Lake Shore case were to be considered overruled, if in conflict with the decision of the case referred to. (*Pennsylvania R. Co.* v. *Towers, supra.*)

Further, we believe that the principles stated in the Lake Shore case are not sound; that they are in conflict with the doctrines announced in many other decisions which have become well established in the law; that the said principles are dicta so far as they extend beyond the issues of the Lake Shore case; and lastly, that the facts and circumstances in that case, as previously outlined, distinguish it from the one at bar.

The broad, sweeping generalizations used by Mr. Justice Peckham are of such a character that they would very seriously embarrass the whole field of government regulation of common carriers if they had become established and recognized by subsequent decisions. Fortunately, they have not become the accepted law.

The decision rendered by Justice Peckham is based upon the theory that no classification of passenger traffic can be made, and not upon the claim that the case presented an unwarranted classification. This distinction becomes very marked if one follows the reasoning of the Court. We believe the correct doctrine recognized in other decisions is that a variation in rates, though it constitutes what we term a discrimniation, does not become an unlawful discrimination by virtue of that fact, but that there must be something more; and that it is just and lawful for rates to vary with the circumstances and conditions. If the rates are established by the Government, there must be a justification for the classification of the shipments or passengers; and if there is such a justification, the law is constitutional and valid.

Mr. Justice Peckham briefly mentions, in passing, the arguments as to wrongful classification. The weight of his entire discussion is concentrated, however, on the proposition that the state once having established one rate for all people to pay, the Government must then rest, and can make no changes as to groups or classes of shippers or passengers whether the classification is just or unjust. The thought is reiterated over and over in the decision.

This decision has never been followed as a controlling precedent on the broad doctrine there stated.

Mr. Justice Peckham would have had it that if the leg-

islature or the Commission fixes one rate that rate must be for the entire community, and then it must cease all attempt to control the charges in the passenger traffic until it makes another horizontal change for everybody. Fortunately, no such theory has ever been injected into our discussion of freight rates, and it is gradually being abandoned in our discussion of passenger fares.

Illustrating the character of the principles upon which Mr. Justice Peckham relied in the Lake Shore case, we call attention to the following passages:

> "The legislature having fixed a maximum rate at what must be presumed, *prima facie*, to be also a reasonable rate, we think the company then has the right to insist that all persons shall be compelled to pay alike, that no discrimination against it in favor of certain classes of married men or families, excursionists or others, shall be made by the legislature." (*Id.*, 697.)
>
> "If the legislature can interfere by directing the sale of tickets at less than the generally established rate, it can compel the company to carry certain persons or classes free.
>
> "If the maximum rates are too high in the judgment of the legislature, it may lower them, provided they do not make them unreasonably low as that term is understood in the law; but it cannot enact a law making maximum rates and then proceed to make exceptions to it in favor of such persons or classes as in the legislative judgment or caprice may seem proper." (*Id.* 694, 695.)

In contrast with the foregoing declarations, we call attention to the later decision of this Court in the Towers case, to the following effect:

> "That the State may fix maximum rates governing one-way passenger travel is conceded. Having the general authority to fix rates of a reasonable nature, we can see no good reason for denying to the State the power to exercise this authority in such

> manner as to fix rates for special services different from those charged for the general service." (*Pa. R. R. Co.* v. *Towers, supra,* p. 11.)

The principles stated above by Mr. Justice Peckham, speaking for the Supreme Court in the Lake Shore case, do not constitute the recognized and established law concerning this subject, and to the extent that such principles go beyond the particular circumstances of that case, the decision should certainly not be accepted as a precedent; and further, where it is felt that the circumstances are analogous in another case in which the evidence tends to show a just classification of passengers or shippers, then in such a case the Lake Shore decision should be overruled as was done in the Towers case.

The decision in the Lake Shore case, *supra,* was rendered by a divided court, the Chief Justice and Justices Gray and McKenna dissenting.

The decision has been subjected to much criticism subsequent to that date. An attempt to qualify and interpret the decision was rendered by a western state court in a case entitled *In re* M. G. Gardner, 84 Kan. 264, 113 Pac. 1054; 33 L. R. A. (N. S.) 956. The Supreme Court of Kansas had under consideration and held invalid a law of that state, requiring carriers to haul the Kansas National Guard when in the performance of military duty at the rate of one cent per mile; the court quoted at length from the Lake Shore case, *supra,* and then commented as follows:

> "This court is not inclined to the view that the power of the legislature is completely exhausted by a maximum rate regulation, and does not so interpret the decision quoted. But members of the National Guard cannot be segregated from the body of the state's citizens, and made a preferred class, unless

> they sustain some relation to transportation by rail, which, in the nature of things, indicates they should have the benefit of an exceptional rate. Classification to be valid must be based upon differences in character, condition, or situation which lead to that difference in regulation which the statute undertakes to make." (*Id.*, 958.)

The court then proceeded to discuss the case involving reduced rates for school children on street cars entitled, *Comm.* v. *Interstate Colsolidated St. Ry. Co.*, 187 Mass. 436, 11 L. R. A. (N. S.) 973, 73 N. E. 530. Commenting on it the Kansas court declared:

> "This court neither approves nor disapproves the conclusion reached in that case, but the method employed for testing the classification upon which the rate was based is sound." (*Id.*, 958.)

Subsequent events have confirmed the conclusion of this court.

In another case involving special fares for the militia wherein the defense that the law was non-compensatory was waived, a decision was reached practically opposite to that of the Kansas court just quoted.

The law required railroads to haul members of the National Guard at the rate of one cent per mile. During the trial no evidence was taken to sustain the allegations made by the carrier that the rate was non-compensatory or confiscatory in character. At the opening of the trial counsel stated: "The defendant at this time waives any defense or contention made under paragraphs seventh and eighth of its answer." *State of Minn. ex rel.* v. *Chicago, M. & St. Paul R. Co.*, 118 Minn. 380, 137 N. W. 2, 41 L. R. A. (N. S.) 524, 526.

The court very clearly recognized the propriety of a classification and the establishment of a lower rate for

a given class if that classication be just. On this proposition the Court stated:

> "We cannot conceive of any violation of any provision in either Federal or State Constitution where the state requires a railway company to carry its military force for a fair and reasonable compensation. The mere fact that a maximum passenger rate has been fixed at 2 cents per mile does not prove that a lower rate is not compensatory or reasonable under certain conditions. On the contrary, we think it should be assumed, till the contrary appears, that the rate of 1 cent per mile established by the act is valid, and to be valid implies that the compensation is a just and fair equivalent for the service required. But the express waiver of inadequate compensation as a defense takes out of the case the contentions that the law deprives the railway company of its property without due compensation or without due process of law, and that defendant, for that reason, is not given equal protection under the laws." *State of Minn. ex rel.* v. *Chicago, Mil. & St. Paul R. Co.*, 118 Minn. 380, 137 N. W. 2, 41 L. R. A. (N. S) 524, 526.

On the further question of the discriminatory character of the act in question, the court said it presented a more doubtful issue, but it held that the discrimination could not be interpreted as against the railway company, "if this be discrimination at all it is against the traveling public generally and in favor of the state." The court said that the Kansas court had overlooked the finding of the Supreme Court of the United States to the effect that a discrimination in favor of the state is not illegal. It relied upon the decision of the Supreme Court in the Consolidated Gas Company case.

> "In *Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53 L. Ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034, where a legislative act was attacked as discriminatory, the syllabus, in part, is: 'Provision in a gas rate act establishing one rate for the munici-

> pality and another for individual consumers is not an unreasonable classification, and does not render the act unconstitutional under the equal protection clause of the 14th Amendment. Where none of the different classes of consumers complain of different rates, the corporations cannot complain of such differences, provided the total receipts are sufficient to yield an adequate return.'" (*Id.* 527.)

The Massachusetts case cited above will receive further consideration later. At this time we shall review the extended list of mileage book cases which the counsel for the carriers brought together in their brief, in an attempt to indicate the wide acceptance of the doctrines of the Lake Shore decision.

REVIEW OF CARRIERS' SO-CALLED MILEAGE BOOK DECISIONS.

In the carriers' brief, an attempt is made to present an analysis of decisions concerning mileage books. The review commences with the following declaration on page 36:

> "The principle of the mileage book or scrip-coupon ticket at a lower rate has been condemned as an arbitrary and unjust discrimination in the following decisions."

After discussing numerous cases, counsel state on page 53:

> "The above are all the cases dealing directly with mileage or scrip-coupon tickets. There are, however, a number of important decisions directly based upon other special forms of passenger fares in which this point has been considered."

Then follows a list of other cases. Counsel may not have intended these comments as to all intermediate cases cited; and yet the text would so indicate.

We shall undertake a brief analysis of these so-called mileage book cases in the order used by counsel:

1. *In re Mileage Books*, 28 I. C. C. 318, 323:

The charge made by counsel for the carriers that the Commission in this case condemns the mileage book as "an arbitrary and unjust discrimination," is wholly unfounded. If it were an unjust discrimination it would be unlawful, and yet the Commission recognized the fact that it was lawful. The Commission held that it had no power to require the carrier to maintain such a tariff. This was before the present statutory requirement.

2. *Proposed Increases in New England*, 49 I. C. C. 421:

In this case it is true that the Commission found great abuse in the practice relative to mileage books in New England, which was severely condemned. It is also true that the Commission found party rate tickets subject to great abuse in the same territory:

> "The General Passenger Agent of the Boston and Maine, testified that the 12-trip tickets, which are said to be sold in no other part of the country, result in greater abuse than any other form of ticket." (*Id.* 445.)

However, the Commission did not condemn the mileage books as constituting an unjust discrimination, but instead they authorized a continuance of mileage books at one-tenth to one-eighth cent below the standard fare, so-called; and also the Commission authorized 25-trip family tickets at one-half cent per mile below the regular one-way ticket. These family tickets were to be usable all over the Boston and Main Railroad and throughout Massachusetts. (*Id.* 445-446.)

3. *Lake Shore & Michigan Southern Ry. Co.* v. *Smith*, 173 U. S. 684:

The carriers describe this as "the leading case." It is not in point for the reasons which we have stated quite extensively elsewhere.

4. *Beardsley* v. *N. Y., L. E. & W. R. R.*, 162 N. Y. 230; 56 N. E. 488:

This case involved a statute requiring the issuance of mileage books for a thousand miles. Without discussing the principles involved, the New York court accepted the decision in the Lake Shore case as controlling. In a concurring opinion, Mr. Justice Vann stated:

> "This case is necessarily governed by the principles laid down by the Supreme Court of the United States in *Railway Co.* v. *Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. ed. 858. While I do not yield assent to the reasoning of that great court in that case, I am compelled to yield to its power, and vote for reversal, but not for a dismissal of the complaint. As the action of the courts below was in accordance with the law of this state as it was, apparently, if not actually, when they acted, the reversal should be with leave to the plaintiff to apply at special term for permission to discontinue without costs, on the ground that the further prosecution of the action has been made impossible by a controlling decision not rendered by a court of this state." (*Id.* 489.)

The carriers omit reference to another New York case involving mileage books, which is known as the Purdy case, which we shall discuss later.

5. *Commonwealth* v. *Atlantic Coast Line R. R.*, 105 Va. 61; 55 S. E. 572:

In this case there were some very burdensome regulations involved, requiring the carriers at all stations both

where they stopped regularly and where they stopped on flag, to be kept open day and night for the sale of mileage books. The books were good for all members of the family as well as for the purchaser.

6. *State* v. *Great Northern Ry.*, 17 N. D. 370; 116 N. W. 89:

This decision involved a statute providing a general passenger fare of 2½ cents, and a mileage book fare of 2 cents, and consequently is not in point in the present proceeding for the same reasons that the Lake Shore case is not in point.

7. *State* v. *Bonneval* (La.), 55 So. 569:

This case is analogous to the Lake Shore case, in part. There was a maximum fare law prescribing a 3-cent fare. The carriers were maintaining, voluntarily, a 2½-cent mileage book rate; but the state attempted to prescribe certain rules and regulations, amongst which was the requirement that the said mileage ticket should be good for any member of the family of the holder of the book. On the precedent of the Lake Shore case the court held the statute unreasonable. In the present controversy no such issue is presented. The rules and regulations proposed by the Commission have been accepted by all parties.

8. *Chicago R. I. & P. Ry. Co.* v. *Ketchum*, 212 Fed. 986:

This case does not involve mileage books, but concerns excursion tickets to a state fair; further, the court found the rates non-compensatory.

> "There is no conceivable chance of profit to the railroad company which would make this law valid." (Carriers' Brief, 45.)

9. *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585:

This case involved coal rates and is not a mileage book case. Further, it involved a requirement, according to the digest of the railroad counsel "to transport it (the commodity) at a loss or without substantial compensation." (Carriers' Brief, p. 46.)

10. *Atlantic Coast Line R. R.* v. *North Carolina Corporation Commission*, 206 U. S. 1:

This case did not involve mileage books at all, but concerned train schedules.

11. *Vandalia R. R.* v. *Schnull*, 255 U. S. 113, 119:

This case was not a mileage book case,—it involved freight rates on groceries.

12. *Norfolk & W. Ry.* v. *West Virginia*, 236 U. S. 605, 608, 609:

This case was not a mileage book case, but involved a flat passenger fare on all traffic. The operating ratio on passenger traffic was 97.42 per cent, and that included express traffic. The leading witness for the state admitted that if express traffic were excluded, the passenger traffic would be handled at or about cost.

13. *Chicago, Milwaukee & St. Paul R. R.* v. *Wisconsin*, 238 U. S. 491:

This is not a mileage book case, but involved a statute virtually requiring the carrier to make a gift of an additional berth to a passenger if the upper were not occupied, which is rather far-fetched as a case in point in our present discussion.

14. *Railroad Commissioners of Georgia* v. *Louisville & Nashville R. R. Co.* (Ga.), 80 S. E. 327:

This was not a requirement as to the establishment of mileage books, but it did require the railroads to permit the tearing off of the coupons on the trains where the carriers themselves sold the mileage books or scrip-coupon tickets.

15. *State* v. *Maine Central R. R. Co.* (N. H.), 92 Atl. 837.

In this proceeding the carriers have sadly distorted the findings of the Supreme Court of New Hampshire, saying:

> "The only question raised or decided, however, was as to the sufficiency of the fare, it being contended that the statute was confiscatory." (Carriers' Brief, 53.)

As a matter of fact the New Hampshire court cites the Lake Shore case, *supra*, and directs specific attention to the distinguishing feature comparing the Michigan and New Hampshire statutes in that the latter had not prescribed any general maximum passenger fare prior to the enactment of the mileage book legislation.

That concludes what the carriers say constitutes "all the cases dealing directly with mileage or scrip-coupon tickets." This long list of so-called mileage book cases, when simmered down, may be summarized as follows:

Seven of them, or almost one-half the total number, do not concern the validity of requirements for the issuance of mileage books.

Two of them—the Louisiana and the North Dakota decisions—involve the validity of mileage book legislation, but like the Lake Shore case, they are not in point, because there is also a general statutory maximum fare in effect, thereby coming under the alleged rule of the

Lake Shore case, and by that very reason being distinguished from the pending litigation.

None of the cases cited by the carriers deal with interchangeable scrip-coupon books.

Only two of the decisions involved statutes relative to mileage books not accompanied by a general law in the same state prescribing a single maximum passenger fare. One of these (*State* v. *Maine Central, supra*), held contrary to the claims of the carriers in the pending case; and the other (*Commonwealth* v. *Atlantic Coast Line, supra*), held in their favor. The latter case, however, involved a very unusual law, described as follows:

> "The Virginia mileage Act requires the companies at all times, day and night, at all stations, regular and flag, to keep on sale books of 500 miles and over, and that 'it shall be unlawful for any transportation company or corporation operated by steam to charge or collect a greater sum than two cents per mile on such mileage books, and such mileage books shall be good and valid for the use of any dependent household member of the family of the party to whom issued, dwelling under the same roof, within one year from the date of same.'" *Commonwealth* v. *Atlantic Coast Line R. Co.*, 105 Va. 61, 7 L. R. A. 1086, 1093.

We shall supplement the foregoing list of cases with certain decisions that the carriers have omitted from their list, and also with a few leading cases in which the fundamental principles involved are very ably stated.

The force of the Beardsley, New York case is very seriously weakened by the subsequent Purdy decision, which carriers fail to mention in their analysis.

The *Purdy Case*, 162 N. Y. 42; 56 N. E. 508.

Counsel for the carriers cited the case of *Beardsley* v. *New York, etc., supra*, but neglected to cite in their list

of mileage book cases another decision (*Purdy* v. *Erie R. Co., supra*), rendered approximately at the same time by the same court, (the Beardsley case being decided March 2, 1920, and the Purdy case, February 27, 1900). In this later case the Court of Appeals of New York sustained the constitutionality of the law establishing mileage books in that state as applying to companies incorporated subsequent to the enactment of the legislation. There had been an amendment to the previous law passed in 1895, but the court found that all changes were favorable to the railroads and held that the defendant company should be required to keep mileage books for sale in accordance with the provisions of the law. "The authority to construct and operate a railroad is not the natural right of a citizen, but a franchise proceeding from the favor or grant of the state. As a condition of such grant, the legislature might require the company to transport passengers at any prescribed rate of fare." (*Id.*, 45.) The decision was concurred in by the Chief Justice, Gray, Bartlett, Vann and Werner. Justice Martin concurred in the result. There was no dissent.

The Purdy case, *supra*, was appealed to the Supreme Court of the United States. (185 U. S. 146, 46 L. ed. 847, 22 Sup. Ct. Rep. 605.) The Supreme Court did not pass upon the alleged violation of the 14th Amendment because it was held that the issue had not been properly raised in the federal courts.

Horton v. *Erie*, 72 N. Y. Supp. 1018.
Minor v. *Erie*, 171 N. Y. 566.

The precedent established in the Purdy case as decided in the Supreme Court of New York was followed in *Horton* v. *Erie*, 65 App. Div. 587, 72 N. Y. Supp. 1018,

and *Minor* v. *Erie*, 171 N. Y. 566, 64 N. E. 454, which the carriers also omitted from their analysis.

Duluth Street Railway Co. v. *Railroad Commission of Wisconsin*, .. Wisc. .., 152 N. W. 887.

The principle of the mileage book as announced in the Lake Shore case was invoked by the Duluth Street Railway Company in a case arising in Wisconsin, involving an order that six tickets should be sold for 25 cents upon the street railway. The Supreme Court of Wisconsin refers to the ruling in the Lake Shore case concerning discriminations against the purchasers of the ordinary one trip ticket, and concerning the principle that the law does not recognize wholesale and retail rates in matters of transportation and then holds as follows:

> "It is argued that here a discrimination is practiced between those who desire to purchase only a single ride and in favor of those who are able and willing to invest 25 cents in tickets. To so hold would amount to carrying the doctrine of discrimination to a ridiculous limit. The idea that it is a burden on any one who desires to patronize the street railway company to invest 25 cents in tickets is pretty far-fetched." (*Id.*, 894.)

Counsel's imposing list of mileage book cases becomes rather weak on analysis. Only one of the decisions is by the Supreme Court, and that one has been subjected to very serious criticism by other decisions of this Court, as well as by those of other courts, both state and federal.

Under the following heading we shall present a review of a few of the leading decisions of the various courts which have dealt with the basic issues involved in this proceeding.

3. THE WEIGHT OF AUTHORITY AND THE BEST INTERESTS OF THE COMMUNITY SUPPORT THE VALIDITY OF THE COMMISSION'S ORDER AT ISSUE IN THIS PROCEEDING.

In *Pennsylvania Railroad Company* v. *Towers*, 126 Maryland 59, 94 Atl. 330, the power of the State Commission to establish rates after having once established a maximum fare was squarely at issue; it was claimed that the State Commision had thereby exhausted its authority and could not make different rates under different conditions. The court says the contention of the plaintiffs may have been in this regard "that while it might be within the power of the legislature and therefore by delegation, within the power of the Public Service Commission, to regulate and establish the single rate fare, yet when it had done so, it had exhausted its power and could not thereafter make any regulation whatever to affect either mileage or communtation rates, and for this claim there is warrant to be found in the language used in the decision of the *Lake Shore & Mich. So. Ry.* v. *Smith*, 173 U. S. 684, in which Mr. Justice Peckham elaborately discusses the question of the validity of an act of the Michigan Legislature, which was intended to regulate the price of 1,000-mile tickets, and holds that in attempting so to do the Michigan Legislature had exceeded its powers." (*Id.*, 94 Atl. Rep. 332.) Upon referring to the several decisions, the Court said:

> "It was contended in argument on behalf of the Public Service Commision that, while not in terms overruled, the effect of the decision in the Lake Shore case, *supra*, had been very much weakened, if not entirely done away with, by other and later decisions. Since the argument of this case, however, the Supreme Court of the United States has rendered opinions in three cases, which clearly show

that in the view of that Court the decision in the Lake Shore case is still in full force." (*Id.*, 94 Atl. 333.)

However, after reviewing these decisions the Maryland Court concludes "From these citations it will be apparent that the limitations placed upon legislative action do not go to the extent of saying that the establishment by state authority of a maximum single rate exhausts the power of state regulation, or that there may not be different rates for different characters of service." (*Id.*, 94 Atl. 335.)

Upon appeal to the Supreme Court of the United States, the same leading issue was discussed and decided.

In the Towers case, (*Pennsylvania R.* v. *Towers*, 245 U. S. 6), the basic question we have at issue was tersely stated by the Court in the following words:

> "The question, as counsel for plaintiff in error states it, is whether a state legislature, either directly or through the medium of a public service commission, under the guise of regulating commerce, may compel carriers engaged in both interstate and intrastate commerce to establish and maintain intrastate rates at less than both the interstate and intrastate standard and legally established maxima. It is asserted that there is no constitutional authority to compel railroad companies to continue the sale of commutation or special class tickets at rates less than the legally established standard or normal one-way single passenger fare upon terms more favorable than those extended to the single one-way traveler." (*Id.*, 9.)

The Court through Mr. Justice Day then proceeds to outline the position of counsel for the carrier:

> "To maintain this proposition plaintiff in error relies upon and quotes largely from the opinion of

this Court in *Lake Shore & M. S. R. Co.* v. *Smith*, 173 U. S. 684. In that case a majority of this court held a statute of the State of Michigan to be invalid. A previous statute of the state had fixed a maximum passenger rate of three cents per mile. The statute in controversy required the issuing of mileage books for a thousand miles, good for two years, at a less rate. This Court held that a maximum rate for passengers having been established, that rate was to be regarded as the reasonable compensation for the service, and that the fixing of the less rate to particular individuals was an arbitrary exercise of legislative power and an unconstitutional interference with the business of the carrier, the effect of which was to violate the provisions of the Fourteenth Amendment to the Federal Constitution by depriving the railroad company of its property without due process of law and denying to it the equal protection of the law.

"The Lake Shore Case did not involve, as does the present one, the power of a state commission to fix intrastate rates for commutation tickets where such rates had already been put in force by the railroad company of its own volition, and we confine ourselves to the precise question presented in this case, which involves the supervision of commutation rates when rates of that character have been voluntarily established by the carrier. The rates here involved are wholly intrastate. The power of the states to fix reasonable intrastate rates is too well settled at this time to need further discussion or a citation of authority to support it.

"In *Interstate Commerce Commision* v. *Baltimore & O. R. Co.*, 145 U. S. 263, this Court held that a 'party rate ticket' for the transportation of ten or more persons at a less rate than that charged a single individual did not make a discrimination against an individual charged more for the same service, or amount to an unjust or unreasonable discrimination within the meaning of the Act to Regulate Commerce. In the course of the opinion the right to issue tickets at reduced rates good for limited periods upon the

principle of commutation was fully recognized. See pp. 277-280.

"Having the conceded authority to regulate intrastate rates, we perceive no reason why such power may not be exercised through duly authorized commissions and rates fixed with reference to the particular character of the service to be rendered.

"In *Norfolk & W. R. Co.* v. *Conley*, 236 U. S. 605, 608, * * * after making reference to *Northern P. R. Co.* v. *North Dakota*, 236 U. S. 585, this Court said:

"'It was recognized (in the North Dakota case), that the state has a broad field for the exercise of its discretion in prescribing reasonable rates for common carriers within its jurisdiction; that it is not necessary that there should be uniform rates or the same percentage of profit on every sort of business; and that there is abundant room for reasonable classification and the adaptation of rates to various groups of services.'

"That the state may fix maximum rates governing one-way passenger travel is conceded. Having the general authority to fix rates of a reasonable nature, we can see no good reason for denying to the state the power to exercise this authority in such manner as to fix rates for special services different from those charged for the general service. In our opinion the rate for a single fare for passengers generally may be varied so as to fit the particular and different service which involves, as do commutation rates, the disposition of tickets to passengers who have a peculiar relation to the service."

The Court outlines the differences in service due to the lower cost of labor in making and selling a ticket of 100 rides, the commuter traveling many times for short-distances, and the public policy involved in the building up of suburbs dependent in part upon these commutation fares.

"After such recognition of the propriety and necessity of such service, we see no reason why a state

may not regulate the matter, keeping within the limitation of reasonableness."

The Court then makes an extract from a New York decision (*People* v. *Public Service Commission*, 159 App. Div. 531, 145 N. Y. Supp. 503), in which there is an extended review of the decisions dealing with this issue which is also pertinent to the present inquiry. The New York Court said in part:

"The law at issue 'empowers' the Commission to fix reasonable and just rates for such service. It is urged, however, that the statute is invalid under the rule of *Lake Shore & M. S. R. Co.* v. *Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565. In that case the statute of Michigan had fixed a maximum passenger rate at three cents per mile. A subsequent enactment required the issuing of mileage books for 1,000 miles, good for two years, at a less rate. The court held that having fixed a uniform maximum rate as to all passengers, such rate was the reasonable compensation for the service, and that the fixing of a less rate to particular individuals was an unreasonable and arbitrary exercise of legislative power; that it was not for the convenience of the public and thus within the police power, but was for the convenience of certain individuals who were permitted to travel upon the railroads for less than the reasonable rate prescribed by law; that the law was, therefore, in violation of the Fourteenth Amendment of the Federal Constitution in depriving the company of its property without due process of law and by depriving it of the equal protection of the laws:

"In *Beardsley* v. *N. Y., L. E. & W. R. Co.*, 162 N. Y. 230, the Court of Appeals felt constrained by the Smith case to declare the Mileage Book Law of this state invalid as to companies in existence at the time of its passage, but in *Purdy* v. *Erie R. Co.*, 162 N. Y. 43, that law was held valid as to companies organized after the statute was passed.

"In *Louisville & Nashville R. Co.* v. *Kentucky*, 183 U. S. 503, after citing the Smith case and like

cases, the court says (at p. 511): 'Nor yet are we ready to carry the doctrine of the cited cases beyond the limits therein established.'

"In the Minnesota Rate Cases (*Simpson* v. *Shepard*), 230 U. S. 352, the legality of an order of the Commission of that state was recognized which fixed a maximum freight rate and passenger rate, the latter at 2 cents a mile, as the maximum fare for passengers twelve years of age or over, and 1 cent a mile for those under twelve years of age.

"In *Interstate Consol. Street R. Co.* v. *Massachusetts*, 207 U. S. 79, * * * the Massachusetts law prescribing special rates less than the maximum for school children was held valid. These cases indicate that the Smith case is not to be extended beyond the facts upon which it rests.

"The Smith case distinguishes itself from this case where the court (at p. 693) says: 'This act is not like one establishing certain hours in the day during which trains shall be run for a less charge than during the other hours. In such case it is the establishing of maximum rates of fare for the whole public during those hours, and it is not a discrimination in favor of certain persons by which they can obtain lower rates by purchasing a certain number of tickets by reason of which the company is compelled to carry them at the reduced rate, and thus, in substance, to part with its property at a less sum than it would be otherwise entitled to charge. The power to compel the company to carry persons under the circumstances as provided for in this act, for less than the usual rates, does not seem to be based upon any reason which has hitherto been regarded as sufficient to authorize an interference with the corporation, although a common carrier and a railroad.

"Our flourishing cities owe their position and prosperity, in part, to the commutation rates for suburban service; the health and welfare of the public are concerned that people doing busines in large cities may live in the country where the surroundings are pleasanter, more healthy and to the advan-

> tage of themselves and their families. It is a known fact that such rates exist upon all railways entering large cities, and have usually been established by the companies voluntarily in the interest of themselves and the public. The service is different in its nature from the other passenger service. It is so universal, of such large proportion, has become so necessary to the public that it cannot be said that the fixing of reasonable and just rates for it is unusual or unreasonable, or the granting of a benefit to individuals and not for convenience to the public." (*Id.*, 9-15.)

Public policy constituted an important factor in the New York case.

Mr. Justice Day then cites the Commutation Rate Case, 21 I. C. C. 428, wherein "the authority of the Commission to fix reasonable rates was sustained." An extract from the Commission's opinion distinguishing that case from the Lake Shore Case was quoted; and the court concludes:

> "The reasoning of these decisions is sound and involves no violation of the Federal Constitution. True it is that it may not be possible to reconcile these views with all that is said in the opinion delivered for the majority of the court in the case of *Lake Shore & Michigan Southern Ry. Co.* v. *Smith*, *supra*. The views therein expressed which are inconsistent with the right of the states to fix reasonable commutation fares when the carrier has itself established fares for such service, must be regarded as overruled by the decision in this case." (*Id.* 17.)

A subsequent appraisal of the situation has been made by a Federal court, as follows:

> "If there was ever any doubt of the right of such a commission to fix a rate for a particular service under special conditions at a figure less than the maximum allowed for such general service (*Lake Shore Railroad* v. *Smith*, 173 U. S. 684, 693, 19 Sup.

Ct. 565, 43 L. Ed. 858), that doubt cannot survive the decision in *Pennsylvania Railroad* v. *Towers*, 245 U. S. 6, 17, 38 Sup. Ct. 2, 62 L. Ed. 117, L. R. A. 1918C, 475." *Tennessee* v. *U. S.*, 284 Fed. 371, page 375.

The principle of the Lake Shore case was invoked by a railroad company in a case entitled *The Southern Railway Company* v. *Atlanta Stove Works*, 128 Ga. 207. The court held the Lake Shore case was not in point. While not dealing specifically with this case in the following extract, the language of the court explains very aptly the power of a commission to deal with economic and industrial conditions.

"We recognize the carrier's right to manage its internal affairs by reducing its tariff below the commission rate, and that such low rate affords no basis for an arbitrary reduction of the commission's maximum standard to the voluntary low rate of the carrier. But we do contend that the commission, in the discharge of its duty to fix reasonable rates, is not precluded from the consideration of economic conditions recognized by the carriers in the conduct of their business. The full purpose of the creation of the commission would be thwarted if it could not consider and act on every economic or industrial factor potentially influencing the operation of a railroad and the transportation of freight. It cannot act arbitrarily, nor by edict produce abnormal conditions of trade; it cannot display favoritism by capriciously giving preferential rates to one locality which are denied to another. It may, however, recognize the traffic conditions between given points, and adjust its schedule to meet these conditions. If this is done in good faith, and upon sufficient reason, the rate fixed for the special conditions would not be discriminatory, because not applied to other localities, where the special conditions do not exist. Circular 309 does not discriminate against persons or classes of persons by charging one a greater or less rate for the same service than is charged for

all other persons similarly situated. It is an adaptation of rates to meet certain economic and industrial conditions in certain localities."

A case that has attracted much attention in the various decisions is entitled *Massachusetts* v. *Interstate Consolidated Street Railway Co.*, 187 Mass. 436, 73 N. E. 530; 11 L. R. A. (N. S.) 973. Concerning the particular issue in which we are here interested the court cited the Lake Shore case as holding that ordinarily the legislature has not the power to compel an exception from the ordinary rates in favor of a certain class of citizens. However, the Massachusetts court proceeded to say:

> "If the difference is founded on a reasonable distinction in principle such discrimination does not deny the equal protection of the laws. Opinion of Justices, 166 Mass. 589, 34 L. R. A. 58, 44 N. E. 625; *Pacific Exp. Co.* v. *Siebert*, 142 U. S. 339, 35 L. Ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *American Sugar Ref. Co.* v. *Louisiana*, 179 U. S. 89, 92, 45 L. Ed. 102, 103, 21 Sup. Ct. Rep. 43." (*Id.* 11 L. R. A. N. S. 973, 977.)

This is an extract from the opinion of the Massachusetts Supreme Court considering the constitutionality of a statute requiring the carrier to haul school children at half fare. The reasoning of the court upon this issue is quite suggestive:

> "In this case the selection of a class is not entirely arbitrary. The education of children throughout the Commonwealth is a subject for legislation which has occupied the thoughts of our lawmakers from early times. The duty of legislatures and magistrates to be diligent in the promotion of education, among all the people, is specially declared in Chap. 5, ¶2, of the Constitution of the Commonwealth. Compulsory attendance of children in the schools is provided for by our laws. Rev. Laws, Chap. 44, ¶1. Money may be appropriated by cities and towns

for conveying pupils to and from the public schools. Rev. Laws, Chap. 25, ¶15. It cannot be said that the legislature may not concern itself with the transportation of children to the public schools in the interest of popular education, just as it provides such children with books and other necessary articles. Rev. Laws, Chap. 42, ¶35. So far as this statute merely gives help to these pupils in connection with their acquisition of knowledge in the schools, it is justified. As a police regulation in the interest of education, the law may well require street railway companies to permit these children to ride to school upon their cars, without profit to the companies, provided it can be done without causing them loss. But if such a requirement involves expense, the cost can only be put upon the general taxpayers. It cannot be imposed upon the street railway companies, or upon that part of the public which pays fares to street railway companies. If, therefore, it plainly appeared that the enforcement of this section would cause expense to street railway corporations, which they must bear themselves, or put upon other classes of passengers in the form of increased fares to make good the loss from carrying school children at half rates, we should be obliged to hold that there was a taking of property without due process of law, through unconstitutional discrimination.

"We are, therefore, brought to the inquiry whether it was possible for the legislature to conclude that this provision would entail no loss upon the street railway companies. Was it not possible for legislators to decide that pupils, in most cases, go to and from the public schools at hours when the cars are not in use by persons going to and from their work, or by many persons; that the pupils generally are of such age and size as not individually to occupy nearly so much space as other passengers; that the difference between full fare and half fare is of such importance to the parents of many of these pupils, that the number who would ride at the half rate, would be nearly if not quite twice as many as at the regular rate; and that for these and other rea-

sons, railway companies would suffer no loss from carrying the children at half the regular fare? Unless we can say as matter of law that such a view would be untenable, we cannot hold that the statute is unconstitutional. Nothing less than a certainty that the provision would cause loss to the railway companies, or to some of them, would enable us to hold that the legislature was powerless to make the requirement. The question is difficult and doubtful. It involves the consideration of facts which primarily are for the law-making power. All presumptions are in favor of the validity of legislation. The evidence offered by the defendant had no tendency to show that it would suffer loss by carrying these pupils at half the regular rates. For all that appears, it would be in better financial condition at the end of a year, if it carried the children in compliance with the statute, than if it did not carry any of them. We hesitate to say that our lawmakers could not pass the act as one which would put no financial burden upon anybody.

"It has come to our notice in former cases, that before this statute was passed, similar conditions were sometimes imposed by towns in connection with grants of locations, and were accepted with seeming willingness by the railway corporations.

"We are of opinion that the law is constitutional." (*Id.*, 977, 978.)

The decision of the Massachusetts Court was sustained by the Supreme Court of the United States in *Interstate Cons. St. Ry. Co.* v. *Mass.*, 207 U. S. 79.

This Court affirmed the Massachusetts Court not on the issue of the constitutionality of the act, but because the company had accepted its charter "subject to all the duties, liabilities and restrictions set forth in all general laws now or hereafter enforced relating to street railway companies" and so forth, and therefore the company was bound by it in the opinon of the Supreme Court. Mr.

Justice Holmes, however, for himself, discussed the constitutionality of the act; and Mr. Justice Harlan concurred in holding the law constitutional, as not denying equal protection of the laws or taking property without due process of law. Mr. Justice Holmes concurred hesitatingly because of the revenue feature.

> "The objection that seems to me, as it seemed to the court below, most serious, is that the statute unjustifiably appropriates the property of the plaintiff in error. It is hard to say that street railway companies are not subjected to a loss." (*Id.*, 86.)

The Justice refers to the conventional fare of 5 cents adding:

> "Whatever fare, the statute, fairly construed, means that children going to or from school must be carried for half the sum that would be reasonable compensation for their carriage if we looked only to the business aspect of the question." (*Id.*, 86.)

In this discussion there is not a suggestion of the argument of counsel for the carriers in this case, that such legislation is unconstitutional because of discrimination between classes. The revenue issue, the question of confiscation, was the factor that caused the hesitation on the part of the Justice.

The case was followed as a precedent in *Fitzmaurice* v. *New York, N. H. & H. R. Co.*, 192 Mass. 159, 6 L. R. A. (N. S.) 1146, 116 Am. St. Rep. 236, 78 N. E. 418.

The principle of the Massachusetts case was followed in *San Antonio Traction Co* v. *Altgelt*, (Tex. Civ. App.) 81 S. W. 106, which was affirmed on appeal in 200 U. S. 304, 50 L. ed. 491, 26 Sup. Ct. Rep. 261. The Texas law was similar to the Massachusetts statute. The company

did not raise the issue in its pleadings that the reduction would seriously impair its revenues.

A city ordinance in Richmond, Virginia, requiring the school children to be carried at a reduced rate, was contested rather as to the interpretation of the ordinance than as to its legality. The ordinance was sustained in *Northrup* v. *Richmond,* 105 Va. 335, 53 S. E. 962.

In the Commutation Rate Case, 21 I. C. C. 428, decided in 1911, these issues and most of the cases in point were extensively considered by the Interstate Commerce Commission. A commutation ticket has certain basic similarities to a scrip coupon ticket. The distinguishing characteristic is that the commutation ticket is usually applicable between two points only, in conjunction with many other short hauls of like character close to some large city, while the scrip coupon ticket is applicable generally throughout the United States, or some large portion of the same. The elements of similarity are that both tickets provide rates lower than the ordinary single trip charge; that the users of both of these tickets travel in the same cars, and in the same trains as those paying the full fare on each trip, and that both are justified on the grounds of public policy and because of the larger volume of travel than that of the average person paying the full fare, thereby reducing the cost per unit.

Commutation fares were in force by the carrier prior to the order by the Commission. The matter in controversy in the Commutation Rate Case, *supra,* was described as follows:

> "Where, as in this case, the sole substantial question is as to the reasonableness of the commutation fares offered by a carrier to the suburban communi-

ties which it serves, it is contended that the carrier is not accountable to the Commission under the act to regulate commerce so long as such fares are not in excess of its maximum full fares between the same points for its general passenger service, provided the latter are in themselves reasonable. It is insisted that a carrier fully meets its obligations to the public by establishing a reasonable fare for a single one-way passage, and that it cannot be compelled to carry the public or any part of the public at a wholesale or lower fare than is reasonable for a single one-way journey; but that it may, at its pleasure, and without interference by the Commission, sell transportation at certain times, or to certain points, or in a certain quantity, at less than the normal fare, provided only that such special fares are open to all persons who may wish to take advantage of them." (*Id.*, 432.)

Among the many cases cited and discussed in the Commutation Rate Case, we find both the Party Rate Case and the Lake Shore Case, involving the Michigan Statute as to mileage books.

The real matter at stake in the Commutation Rate Case is very similar to the principle we have under consideration at the present moment. The Commission described the issue very definitely:

"If the normal one-way fare between two points is itself reasonable for the service performed on a one-way journey, is the Commission excluded by the terms of Section 22, as is contended, from the consideration of the question whether under Section 1 the lower commutation fare is a reasonable charge to make for the daily service back and forth between the same points?" (*Id.*, 437.)

Concluding its discussion of the subject the Commission held:

"In *Interstate Commerce Commission* v. *B. & O. R. R. Co.*, 145 U. S. 263, it is intimated that in fram-

> ing the act to regulate commerce the Congress did not intend to ignore the principle that one can sell at wholesale cheaper than at retail. * * * This being so, we see no reason why the reasonableness of the fares demanded for the service may not be looked into by the Commission under Section 1." (*Id.*, 443.)

The Commission held it had jurisdiction over the subject. This decision has never been successfully attacked and it has been constantly used as a precedent establishing a basic principle in commerce practice. If the establishment of lower than maximum ordinary passenger fares in and of itself creates an unlawful discrimination this conclusion could not have stood the test. At the present time the carriers have in effect interchangeable mileage scrip books, and the Commission, in the absence of any additional legislation, might have prescribed reasonable fares. But in addition to that we have the additional statutory requirement that the Commission shall prescribe such fares.

The Commission makes the following statement relative to mileage books:

> "It seems to be settled under that section (22) that a carrier may enter upon the policy and practice of issuing mileage books and excursion tickets at less than its regular normal fare for the one-way journey, and, having adopted such a policy, may subsequently withdraw from it and refuse longer to issue such tickets." (*Id.*, 437.)

This comment of the Commission in the Commutation Rate Case was made, of course, prior to the amendment involved in this proceeding.

If it be claimed that the comment of the Commission went to the constitutionality of such a law, it may be

added that the Commission made a similar comment previously as to both party rate tickets and as to commutation tickets. We shall discuss the party rate matter later. In *Sprigg* v. *B. & O.*, 8 I. C. C. 443, the claim of the complainant was that if a carrier has sold commutation tickets for a considerable period, it may be compelled to continue to sell them at less than the general public fares. Concerning this claim, the Commission stated:

> "There is no legal basis for such a contention. If we had full rate-making power as ample and complete as that possessed by the Congress, we could not make such an order. We could in that case prescribe a rate which would be reasonable for everybody to pay * * * but we could not under any circumstances compel the granting of a special and lower rate for the benefit of a particular class." *Sprigg* v. *B. & O. R. R. Co.*, 8 I. C. C. 443, 452, 453.

And yet in the Commutation Rate Case, the Commission, citing this very paragraph ruled directly to the contrary. The attitude of the carriers and their closely knit compact organization, with the natural consequences thereof, have compelled this gradual expansion of the jurisdiction of the Commission.

Referring to the Sprigg case, the Commission said:

> "The report in the case seems to have been understood as a denial by the Commission of its authority to control Commutation Fares." (*Id.*, 435.)

At that time (in 1900) "the commission was without authority to enter an order fixing a reasonable rate for the future." (*Id.*, 436.)

Summing up the decision in the Sprigg Case, the Commission said:

> "On the whole, we are unable to regard the case as decisive of the question now before us, and, so far

as it conflicts with the conclusions here reached, must be understood as now being overruled." (*Id.*, 436.)

Prior to the enactment of the law here under consideration it is possible that the Commission did not have the affirmative authority to require scrip book coupon tickets to be issued at reasonable rates. A development of the law on this and kindred subjects has been along the lines of granting adequate power to the Commission to care for the interests of the public in a reasonable manner.

The decision of the Court in the Towers case, *supra*, and the decision of the Commission in the Commutation Rate Case, *supra*, have been based upon the facts there involved, which included the existence of commutation fares at the periods when the decisions were rendered. In other words the Court and the Commission did not go to the extent of saying that in the absence of any commutation fares being charged by the carriers the Commission or the state would have the power in the first instance of requiring the establishment of such fares. However, they have not held the Commission lacked the power to make such orders. That issue was simply undecided and was unnecessary to be decided upon the records presented.

In the Commutation Rate Case the Commission expressed it as follows:

> "A carrier that has not undertaken a commutation service may possibly not be compelled to do so under the present law; that question is not before us and is not therefore considered."

That case, however, was decided on the basis of the law as it was then worded and did not involve the constitutional issue. Since then we have this amendment to Sec-

tion 22 of the Act under which the present order was entered.

In freight traffic at no time, to our knowledge, has the Court or the Commission ever held that the Commission lacked the power to require a commodity rate to be established. Class rates prevailing as the standard ordinary charge for the movement of the many different articles shipped may be modified at any time by the Commission ordering the establishment of a commodity rate, provided the facts and circumstances warrant the same. The power exists, the sole question being the reasonableness of the exercise of that authority. Likewise as to passenger traffic, once the statute is enacted, certainly the power exists.

The Party Rate case, 145 U. S. 263, 36 L. ed. 699 has been pivotal in the handling of this subject, involving the justice and reasonableness of the establishment of lower than standard fares. The Interstate Commerce Commission held 'that so-called party rate tickets, sold at reduced rates, and entitling a number of persons to travel together on a single ticket or otherwise, are not commutation tickets within the meaning of Section 22 of the Act to Regulate Commerce, and that when the rate at which such tickets for parties are sold is lower for each member of the party than rates contemporaneously charged for the transportation of single passengers between the same points, they constitute unjust discrimination, and are therefore illegal.''

The Commission ordered the Baltimore & Ohio Railroad Company to cease and desist from charging lower rates for persons traveling together in one party than those contemporaneously charged by the same carrier for the transportation of single passengers between the

same points. But their conclusion was not sustained by the Supreme Court. In freight traffic, for many years, all have recognized the propriety of adjusting rates on different commodities or on the same commodity in accordance with the circumstances and conditions surrounding the traffic.

The propriety of applying the same basic principle to passenger traffic was fully recognized by the Court reviewing the action of the Commission in the Party Rate Case.

> "It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust or unreasonable. For instance, it would be obviously unjust to charge A a greater sum than B for a single trip from Washington to Pittsburgh; but if A agrees not only to go but to return by the same route, it is no injustice to B to permit him to do so for a reduced fare, since the services are not alike, nor the circumstances and conditions substantially similar, as required by Section 2 to make an unjust discrimination." *Interstate C. C.* v. *B. & O.*, 145 U. S. 263, 36 Law ed. 703.)

Specifically as to mileage tickets the Court said:

> "In other words, whether the allowance of a reduced rate to persons agreeing to travel one thousand miles or to go and return by the same road is a 'like and contemporaneous service under substantially similar conditions and circumstances' as is rendered to a person who travels upon an ordinary single trip ticket. If it be so, then, under state laws forbidding unjust discriminations, every such ticket issued between points within the same State must be illegal. In view of the fact, however, that every railway company issues such tickets; that there is no reported case, state or Federal, wherein their illegality has been questioned; that there is no such case in England; and that the practice is universally acquiesced in by the public, it would seem that the

issuing of such tickets should not be held an unjust discrimination or an unreasonable preference to the persons traveling upon them." (*Id.*, 279.)

The Court even went further than is usual in freight rate cases in declaring that no such injury would result from the establishment of the lower basis of rates as to passenger traffic which might result in a similar action as to freight traffic:

The Court, in this case, quoted from several English decisions in support of the doctrine adopted. The underlying principle of the cases, is that in order to constitute unjust discrimination, it must be "for a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions." (*Id.*, 281.)

In closing the Court says:

"In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge. These traffic acts do not appear to be as comprehensive as our own, and may justify contracts which, with us, would be obnoxious to the long and short haul clause of the Act, or would be open to the charge of unjust discrimination. But so far as relates to the question of 'undue preference,' it may be presumed that Congress, in adopting the language of the English Act, had in mind the construction given to these words by the English courts, and intended to incorporate them into the statute. *McDonald* v. *Hovey*, 110 U. S. 619. * * *

"Upon the whole, we are of the opinion that party rate tickets, as used by the defendant, are not open to the objections found by the Interstate Commerce Commission, and are not in violation of the Act to

Regulate Commerce, and the decree of the court below is, therefore, affirmed." (*Id.*, 284.)

If certain of the doctrines of the Lake Shore decision, not necessary to the determination of the issues then presented, had prevailed, the hands of the government would have been tied, and the United States, short of a constitutional amendment, would have been helpless in regard to a large volume of public service that vitally concerns the welfare of the community.

In an old Pennsylvania case the distinction between a lawful and an unjust discrimination was very accurately expressed in the language of a referee, Mr. Paul Peter. The law was ably stated in accordance with the best thought that has gradually permeated the decisions of the Supreme Court and of the state courts.

The following contains an extract from the report of the said referee quoted in a subsequent decision of the Supreme Court of Pennsylvania:

> "'I regard it, then, as settled law in this state that a railroad company, a common carrier, owes a duty of equality to every citizen; and I adopt the position taken by Mr. Bullitt in argument that railroad companies have no right to make any undue discrimination or preference in their charges, and a charge made to one shipper higher than another, for the same service, under like circumstances, constitutes undue preference and discrimination, and, by consequence, renders the charge unreasonable.
>
> "'Such is the general rule, and it is vastly important to the general public that there be no undue relaxation of this rule; for, exercising, as they practically do, a monopoly of transportation on their roads, railway managers have in their hands a tremendous power, by discrimination, to enrich one man and ruin another. The equality, however, which is thus prescribed is not a strict and literal equality

under all circumstances, however varying and different. It is rather an equality in the sense of freedom from unreasonable discrimination. It is only unjust, undue, or unreasonable discrimination against which the law has set its canon. Arbitrary discrimination is illegal; is discrimination made with a view of giving advantage to one person. But the truism that circumstances alter cases applies here, and under a different state of circumstances a discrimination may be reasonable and lawful, which, were the circumstances the same, would be undue and unreasonable. In order to render lawful an inequality of charge, the goods must be carried under different circumstances, and the question whether the difference is material or essential arises in each particular case.' The writer regards the foregoing as the most precise and the most felicitous expression of the law upon the general subject under consideration that he has met with, and therefore quotes it entire." *Hoover* v. *Pennsylvania R. Co.*, 156 Pa. 220, 22 L. R. A. 263, 270, 271.

The Lake Shore case is a precedent for the doctrine that a state cannot establish unduly discriminatory rates for any class of citizens. But it is not a precedent for the doctrine that either the State or Federal Government cannot establish reasonable maximum rates of charge for services of a railroad company varying with the circumstances and conditions surrounding those services. Such a principle would invalidate nine-tenths of the decisions of the Interstate Commerce Commission which have stood the test of experience and the review of the courts for many years.

INTERCHANGEABLE SCRIP BOOK TICKETS ARE JUSTIFIED.

In the light of these decisions let us consider the lawfulness of the Commission's order, which is at issue.

As to passenger traffic a theory was advanced in the Lake Shore Case, which we have discussed at length, that only one rate can be established by government authority; then the government must keep hands off; and if there are any variations from that one rate the railroads, and the railroads alone, can make such variations. This is in striking contrast to the principles governing the regulation of freight traffic.

In the discussion of discriminations counsel for the carriers seem to imagine that any variation from a certain fixed rate per individual, per passenger mile, or per ton mile is an unjust and unlawful discrimination. There is no fixed ton mile revenue in existence, and there never has been such. Further we have seen there is no fixed passenger mile revenue in the United States. Such terms are misleading and confusing. Maximum rates are established on the various classes of both passenger and freight traffic in accordance with surrounding circumstances and conditions.

In the Party Rate Case, *supra*, which also applied to passenger traffic, the Court defined what constituted unjust discriminations in the following language:

> "In order to constitute an unjust discrimination under Section 2, the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate, or other device; but, in either case, it must be for a 'like and contemporaneous service in the transportation of a like kind of traffic, under substantially

similar circumstances and conditions.'" *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co., supra,* 281.

We have found the weight of authority sustains a fair, just application of this doctrine to both freight and passenger traffic.

It is said that making a fare for persons able to pay $72 for a scrip coupon ticket lower than that accorded other single trip passengers, creates an unjust discrimination against those other travelers. We shall attempt to analyze the soundness of this, and to consider the facts which warrant the so-called classification attempted in this legislation, if it be such.

The carriers have claimed that the conditions surrounding the person compelled to pay 3.6 cents are analogous to, and the service is substantially the same as, the circumstances and conditions surrounding the haul of the party obtaining the lower rate under this order of the Commission. A somewhat elaborate discussion is presented on this issue by the carriers and some of the argument is referred to in the decision of the Commission under consideration.

There are certain basic differences amply sufficient to warrant the difference in charge.

The distribution of costs over a larger number of units is a factor of fundamental importance.

In order for a person to avail himself of the rate prescribed in the scrip book order he must travel 2,500 miles in a year.

The average individual in the United States, aside from those using this method of transportation, travels from 250 to 350 miles a year.

In other words, the minimum a party must travel in order to secure the scrip book rate is seven or eight times the average distance traveled by the rest of the people in the United States.

The basis for the foregoing proposition is as follows: The carriers estimate the total revenue from those who use the scrip books is $300,000,000 at the present time. (Carriers' Brief, p. 85.) Dividing that $300,000,000 by 3.6 cents, we have 8,333,000,000 passenger miles; and if each individual uses only the minimum mileage of 2,500, there would be 3,333,000,000 persons using these scrip books. Subtracting the 8,333,000,000 passenger miles from the total passenger miles estimated for the year 1922 (32,974,000,000—twice the travel for the first six months of 1922 *ante*, p. 10)—we have as a total miles traveled by the balance of the population, 24,641,000,000. Dividing this total by the balance of the population, the average travel per person is 230 miles. Allowing fairly for children or minors under various ages and eliminating such classes, this average journey of those who do travel, would be increased to about 300 to 350 miles per year.

Therefore the parties using scrip books furnish to the railroads on an average seven or eight times as much travel as the balance of the population averages.

If our entire population traveled on an average the amount those using the scrip books must travel as a minimum, the passenger revenues of our railroads would be multiplied many times. Here is a basic difference.

It has been urged that the excursionist and the traveller who attend fairs, conventions, etc., differ from the travellers who use these scrip books, that the former constitute a more particular class, and obtain a different

service from that of the ordinary traveler. We are told that the railroads can estimate with some degree of accuracy the volume of travel which they will obtain for a convention, or a fair, or for a given summer resort. There is some error, and some element of truth, in such claim. The element of truth therein is an argument against the position of the railroads in this case.

It is true that the railroads attempt to estimate the volume of traffic that they will have on a given excursion rate, which they quote at one-third or one-half of the prevailing rate. That very computation is for the purpose of finding out how many additional special facilities, special cars, special engines, and extra labor, will have to be furnished in order to take care of the traffic, all of which adds to their expenses. On the other hand, the parties who use these scrip books will gradually invade the cars and trains already scheduled to run. They do not require any more engines, or cars, or conductors, or trainmen; but those same cars being operated today gradually fill up with more passengers, and there is plenty of room, as evidenced by the fact that with practically the same equipment in 1919 and 1920 they handled 40 per cent more passenger miles. (*Ante*, p. 10.)

It is immeasurably better for the carrier to have this increased traffic developed in this manner that the scrip book will develop.

On the other hand the carriers are not able accurately to gauge the increased demands growing out of the quotation of special rates for tourists, excursionists, etc. It is a well known fact that the tourists may go in large or small volume. Many factors are involved. Over a period of six months that a summer excursion may last to the coast or to points west of the Missouri River,

passengers may or may not avail themselves of those special fares. When a special rate is charged to some political convention, or to some church convention, there may be a tremendous volume, requiring special effort to get the necessary equipment, and there may be congestion, such as in the Masonic gathering at Washington, D. C., recently. On the other hand the proposition may fall flat, and barely the minimum necessary to secure the rate will be supplied to the carrier; and the carrier will thereby be forced to have equipment which had to be provided to meet the expected crowd, remain idle. All this adds to the cost. Such instances are occurring constantly. They are matters of common knowledge.

There is another very important fact in connection with excursions, political conventions, church gatherings, etc., which serves to distinguish them from the traffic that is served by interchangeable mileage tickets.

There may be some reasons for reserving special fares to excursions, conventions, etc., more completely under the jurisdiction and control of the company. There are multitudes of details to consider in connection with them. They vary from time to time, and the competition of rival lines and rival cities is an important element in arriving at wise conclusions and policies. Such affairs are both local and temporary in character, while the use of these scrip books is state wide or national in character, and lasts the year round. These features may make possible a more efficient state or federal control over the scrip books than could be exercised readily over excursion fares, etc. At the same time the prevention of unjust discriminations in making special fares to excursions and conventions may require the occasional intervention by the government.

The carriers argue that mileage book fares were originally established as a competitive measure to induce merchants and manufacturers to patronize a road. The fact that competition was the original force causing the reduction in the charge does not constitute an argument against the reasonableness of the charge. With the carriers a solid unit under the sanction of the federal government making a universal passenger fare or freight rate, it would be natural for them to insist upon the highest possible charge that would still permit the traffic to move. It has been the force of competition that has created commodity rates. One road would establish a lower than the ordinary class rate, which would later be met or cut by another carrier. As a result a vast body of commodity schedules has been developed. That constitutes no argument against the reasonableness of the commodity rates so established. The fact is that those companies have by this process evolved a schedule of rates that meets in a way with the just needs of the manufacturing and shipping public, and moves the traffic. Likewise competition has served to develop just rates between rival cities. The fact that competition has been the driving force to develop the rate structure constitutes no argument against the reasonableness of that rate structure. The same factor has been present in the development of prices on everything we buy and sell, until the cost of the product reaches the level where the purchaser can and does buy.

The fact that a charge is the product of competitive forces does not prove or disprove its reasonableness.

It has been suggested that persons who would normally pay the standard fare will make use of this scrip book. The argument is so futile that it is hardly worth mention-

ing in passing. There is not a convention, or a fair, or a tourist excursion in the United States where there are not parties uninterested in the particular proposition who avail themselves of the reduced fare; these parties would otherwise pay the ordinary maximum fare.

Another argument as to the character of the service is that the person holding the scrip book rides in the same car and in the same train as the person not holding such book travels in; and yet one pays the 20 per cent reduced rate while the other pays the full 3.6 cent rate. That fact, stated by itself without the answer, may seem effective, but in the same breath the party making the statement should add—practically the same thing is true of every excursion, of every convention, of every tourist journey and of every commutation haul in the United States. The man going to the Presbyterian Convention at Philadelphia on his excursion fare is in the same car on the same train with the party paying his 3.6 cents. The man going to the Rockies for his summer holiday travels in the same train with the man paying his 3.6 cent fare. The person shipping a carload of coal has the commodity handled in the same train with a carload of livestock paying several times the same rate per ton mile. While that particular condition of the same car or the same train is analogous, other conditions are dissimilar; and those other factors are what justify the difference in the charge. It is true that we cannot separate the passengers going on the excursion rate from those paying the standard fare in the same train, and from a practical standpoint, how foolish it would be to make such a separation. Nevertheless, the creation of the convention fare and the excursion rate stimulates travel. That travel is substantially different

in character and in volume; and this is sufficient to warrant the difference in the charge, the one paying the standard and the other paying the reduced fare, although the two parties have the same conductor, the same brakeman, may sit in the same seat, and look out of the same window, and are served by the same roadbed. The suggestion that they are receiving the same service substantially, and therefore should pay the same rate is superficial, and does not get below the surface of things. If the fact that the passengers may look out of the same pane of glass, and sit on the same seat, etc., as other persons not interested in the excursion, is used as a justification for compelling the same rate, we could not have commutation fares, or tourist rates or conventions, or excursions in the United States. To eliminate these would be costly to the public; it would be costly to American industry, because they not only stimulate an increased movement, but they develop intercourse and commerce among the people.

Likewise, the commercial travelers of the country, and the people that are able to use the 2,500 mile ticket who are not commercial travelers getting the same fare, are similar to the man going to the convention, and the man going to the same city on business, who both use the same rate. That is an attendant incident, inevitable in character, that it is almost physically impossible to alter in the practical exigencies of the case.

The charging of a lower fare to those purchasing the mileage book, if it is not confiscatory in nature, does not work an injury to the parties who pay the higher fare. The contrast between this phase of the situation in the passenger travel, and the similar phase of the situation in freight traffic, is very marked. If one person in a

local community is charged a lower rate than his competitor in the same community for the shipment of the same commodity, that individual obtaining the lower freight rate can possibly drive his competitor out of business. The constant margin or handicap the party with the lower freight rate has in the handling of his goods increases as the volume of the goods which he handles increases. Therefore, the discrimination or difference in the freight charge has a powerful effect on business. On the other hand, a passenger who travels an average about 300 miles a year and is charged 3.6 cents per mile has a total cost per year of $11 or $12. A 20 per cent reduction would not stimulate or depress his business activities. On the other hand, to the large manufacturer or wholesaler having several score or several hundred traveling men throughout the nation, this would be of vital importance—both to the employer and the employe. It might mean thousands of dollars to a single enterprise. It might constitute the margin or difference between success and failure, between activity and idleness.

The fact that his neighbor, who travels 2,500 miles a year gets a lower fare than the party who travels 300 miles a year at a cost of $10.80 can have no possible effect on the development of the business of the latter individual.

If the party receiving the scrip book and travelling his 2,500 miles is compelled to pay the higher fare, the other individual travelling the 300 miles has gained nothing.

One furnishes eight times the travel furnished by the other. All the overhead costs, all the general expenses, all the interest and return on investment in terminals and roadbed and equipment are less per unit for the larger amount of travel.

This difference in the effect on freight traffic and on passenger trafic of different rates and charges, and the resulting creation of unjust discrimination was expressed by the Court in the Party Rate Case many years ago, when it said:

> "If for example a railroad makes to the public generally, a certain rate of freight and to a particular individual residing in the same town a reduced rate for the same class of goods, this may operate as an undue preference, since it enables the favored party to sell his goods at a lower price than his competitors, and may even enable him to obtain a complete monopoly of that business. Even if the same reduced rate be allowed to everyone doing the same amount of business, such discrimination may, if carried too far, operate unjustly upon the smaller dealers engaged in the same business and enable the larger ones to drive them out of the market.
>
> "The same result, however, does not follow from the sale of a ticket for a number of passengers at a less rate than for a single passenger; it does not operate to the prejudice of a single passenger, who cannot be said to be injured by the fact that another is able in a particular instance to travel at a less rate than he. If it operates injuriously toward any one it is the rival road, which has not adopted corresponding rates; but, as before observed, it was not the design of the Act to stifle competition, nor is there any legal injustice in one person procuring a particular service cheaper than another." (Party Rate Case—*Int. Com. Com.* v. *B. & O.*, *supra*, 280.)

Referring to the lack of injury or damage to other individuals, the Court said as to party rate tickets:

> "If these tickets were withdrawn, the defendant road would lose a large amount of travel, and the single trip passenger would gain absolutely nothing." (*Id.*, 281.)

History of Passenger Fares.

A concise history of passenger traffic and the charges which have been collected by the carriers in the past, was contained in the decision of the Court in the Party Rate Case, *supra.*

The application of the postage stamp theory to the passenger traffic by the railroads did not come until we entered the World War in 1918. Many fares designed to meet the condition of different kinds of traffic were cancelled by the Director General when he took office. Some were restored almost immediately, while others have been gradually re-established. At the time of the enactment of the Interstate Commerce Law originally and ever since, up to 1918, it was customary for the carriers, in order to encourage increased travel, and with proper recognition of the relative volume of travel, to give rates lower than those to which the regular one trip tickets applied. The Court in the Party Rate Case, listed these various forms of traffic. It will be noted that the rates reduced have been restored on all of these different classes of traffic, with the single exception of that provided especially to meet the needs of the commercial traveler. The language of the Supreme Court is significant with respect to this situation:

> "But, whether these party rate tickets are commutation tickets proper, as known to railway officials, or not, they are obviously within the commuting principle. As stated in the opinion of Judge Sage in the court below: 'The difference between commutation and party rate tickets is, that commutation tickets are issued to induce people to travel more frequently, and party rate tickets are issued to induce more people to travel. There is, however, no difference in principle between them, the object in

both cases being to increase travel without unjust discrimination, and to secure patronage that would not otherwise be secured.'

"The testimony indicates that for many years before the passage of the Act it was customary for railroads to issue tickets at reduced rates to passengers making frequent trips, trips for long distances, and trips in parties of ten or more, lower than the regular single fare charged between the same points; and such lower rates were universally made at the date of the passage of the Act. As stated in the answer, to meet the needs of the commercial traveler the thousand mile ticket was issued; to meet the needs of the suburban resident or frequent traveler, several forms of tickets were issued. For example, monthly or quarterly tickets, good for any number of trips within the specified time; and ten, twenty-five or fifty-trip tickets, good for a specified number of trips by one person, or for one trip by a specified number of persons; to accommodate parties of ten or more, a single ticket, one way or round trip, for the whole party, was made up by the agent on a skeleton form furnished for that purpose; to accommodate excursionists traveling in parties too large to use a single ticket, special individual tickets were issued to each person. Tickets good for a specified number of trips were also issued between cities where travel was frequent. In short, it was an established principle of the business, that whenever the amount of travel more than made up to the carrier for the reduction of the charge per capita, then such reduction was reasonable and just in the interest both of the carrier and of the public." (*Id.*, 279.)

With the party rate ticket at issue the Court has made the foregoing statement. With the scrip books at issue we should like to add, with due respect:

The differences between commutation, party rate and interchangeable mileage tickets are, that commutation tickets are issued to induce people to travel more fre-

quently; party rate tickets are issued to induce more people to travel; and interchangeable mileage tickets are issued to induce more people to travel more frequently. There is, however, no difference in principle between them, the object in all cases being to increase travel without unjust discrimination, and to secure patronage that would not otherwise be secured.

This great body of commercial and professional men of the country who will use this scrip book will stimulate travel. These commercial men are the emissaries of business. They are the men who furnish the bulk of the freight that the railroads haul. The drastic increase in passenger fares which forced thousands of traveling men to be retired to the idle class was one of the unfortunate events of recent history; this helped to bring on the commercial depression that we have passed through. Nobody is suggesting here that this was the controlling factor; but it was unquestionably a contributing factor of large importance, and it should be removed.

V. THE CARRIERS HAVE FAILED TO PROVE THAT THE REDUCED FARES ORDERED BY THE COMMISSION ARE NON-COMPENSATORY.

In order to overthrow this order of the Interstate Commerce Commission on the ground that the fares are confiscatory, the carriers have not gone to the trouble of ascertaining the expenses of the traffic under consideration; and they have not ascertained any actual or estimated value of the property devoted to this service.

On this record there is not even an approach to a showing that the fares ordered would be confiscatory, in accordance with the customary methods adopted in the many railroad and public utility cases that have come before this tribunal.

Before any order of a state or national legislative body or commission is overthrown on the ground that the rates are non-compensatory or confiscatory the usual course is to show the value of the property devoted to the service and the expenses of the traffic at issue, with the resulting net revenues applicable to that property. In the leading case of *Smyth* v. *Ames* (169 U. S. 466, 42 L. Ed. 819), a failure to make the proper segregation for state traffic was fatal to the complainant. This has been followed by many other decisions of like tenor.

THE RATES AT ISSUE PRODUCE A SUBSTANTIAL PROFIT ABOVE EXPENSES.

While many references are made by counsel for the carriers to the confiscatory character of the rates, yet the only attempt on this record to substantiate the claim is a computation, based upon an erroneous premise. And the said computation involves no allocation of property to the traffic under consideration.

On pages 7 and 8 of their brief counsel for the carriers say:

> "The Commission found that the operating ratio for passenger service at the standard rate of 3.6 cents per mile for the year 1921 was 85.24 per cent. That is, of every 3.6 cents, 85.24 per cent was required to pay operating expenses; in other words, that, for every mile for which the carriers received of a passenger 3.6 cents, it cost the carriers over 3.06 cents to transport him. The requirement that interchangeable tickets should be sold at a reduced rate equivalent to 2.88 cents per mile results in requiring the transportation of passengers riding on such tickets at a loss of more than .18 cents per mile."

In this computation carriers have referred to the "present standard rate of 3.6 cents," whereas we have seen that 75 per cent of the travel is carried today on rates which average 2.84 cents per mile.

In the foregoing computation the carriers assume that 85.24 per cent of every 3.6 cents was necessary in order to pay operating expenses. That assumption is based on an interesting misinterpretation of what the Commission held. Counsel say that the Commission found that the operating ratio for passenger service "at the present

standard rate of 3.6 cents per mile for the year 1921 was 85.24 per cent." That operating ratio was the average of all passenger traffic. If it were true that every passenger paid 3.6 cents per mile that application of the operating ratio would be correct. As a matter of fact, however, every passenger does not pay 3.6 cents per mile, as can very readily be demonstrated. Commissioner Daniels, in his dissenting report (77 I. C. C. 219), says that the gross passenger revenue for the first six months of 1922 was approximately $500,000,000. In the opinion of the majority, at page 203, revenue passenger miles are shown to be 16,487,000,000 for the same period. Dividing one figure into the other produces an average per passenger mile of 3.03 cents instead of 3.6 cents. Applying the operating ratio of 85.24, which the record shows was for all passenger traffic, to 3.03 cents, produces an average expense per passenger mile of 2.58 instead of 3.06 cents as stated by counsel for the carriers. This computation based on the carriers' own figures discredits their argument of confiscation.

The absurdity of counsel's claim of operating expenses averaging 3.06 cents per passenger mile, is demonstrated by simply applying that cost to the total passenger miles during the first six months of 1922, as shown in the Commission's report at page 203—16,487,000,000. Multiplying these two factors we find a total operating expense for the passenger traffic of $504,502,200; this is larger than the total passenger revenue for the six months in question, which, as previously stated, was approximately $500,000,000.

In other words that claim of counsel that 3.06 cents is the average cost per passenger mile would produce an operating ratio of more than 100 per cent for the pas-

senger traffic as a whole, whereas the Commission found the operating ratio to be 85.24.

If the cost were 3.06 cents on all branches of the passenger traffic, then every excursion hauled, and every commutation service rendered result in loss to the carrier.

This error on the part of railroad counsel is simply a mathematical mistake. There can be no issue between us as to basic figures, or what those figures purported to show.

Counsel for the carriers on page 84 of their brief before the lower court make a similar comment to that quoted above, in the following words:

> "The order is void because it prescribes non-compensatory rates. The Commission, as stated above, found that for the year 1921 the passenger operating ratio of Class 1 roads was 85.24. This means that out of every dollar of passenger operating revenue 85.24 cents were spent to meet the cost of service." (Carriers' Brief, 84.)

The Commission never made a finding to that effect. There is a wide range in the handling of passenger traffic. Contrast the commutation service, which has received such extended consideration in the decisions, with the crowded passenger coaches going from the large cities to the suburbs, and the attendant special equipment, expedited movement, extra labor, expensive congested terminals at the great cities, expensive right of way in cities and suburbs, costly maintenance, overhead crossings, elevated tracks, etc., etc., which do not exist on a local movement of a passenger car out on a branch line, or on a main line of the same railroad far from any congested center, moving at ordinary speed, in a regular train.

But the large volume of traffic in the commutation service means that the company can handle that traffic on a smaller margin. The operating ratio might be 95 or more and there still be a substantial profit in the enterprise.

The comments just made as to commutation service apply equally to an excursion where the railroad has to put on extra equipment, moving empty passenger cars perhaps several hundred miles to a point where they are needed to accommodate crowds that are going on the excursion. Special trains have to be fitted up for that service, hours have to be changed and revised, new men employed, etc.

Contrast the cost of a crew handling an excursion train with the cost of a cheap coach on the end of a mixed freight and passenger train on a branch line. The variation in cost is very large.

The Commission's finding was that the operating ratio of 85.24 applied to the passenger revenues, as a whole. There is no foundation on this record for assuming that percentage also applies separately to each branch of the passenger service. To claim that this applies to every dollar, as phrased by counsel for the railroads, is an absurdity. It would be like finding the operating ratio in the freight traffic, and then deducing from that fact, that the operating ratio corresponds to that precise figure in the handling of coal, as well as in the handling of oil, or dry goods, or any other kind of specific traffic. Such an assumption is untenable. If a party were attempting to prove that the rates on coal are confiscatory, no court would listen to the claim that the operating ratio on all traffic showed the costs of handling coal.

We know from the record that the revenue from pas-

senger traffic in the Eastern district averages 3.03 cents per passenger mile. The record shows that the operating ratio in 1921 was 85.24, therefore we know that the costs averaged 2.58 cents per passenger mile.

The burden of proof rests on the carriers. They have established these figures, and they have not shown the cost averages any more on the passenger travel at issue, than on all passenger travel in the district. A cost of 2.54 cents per passenger mile compared to a revenue of 2.88 cents leaves a substantial profit of slightly more than 10 per cent. We cannot tell from the record what that would produce on the value of the property devoted to this traffic.

From the record we cannot determine with certainty that even these figures are accurate. We are dealing with averages on all passenger traffic, and not with actual cost of the traffic at issue.

The analysis of operating ratios instead of returns on value, will be a novel departure in the discussions on confiscatory rates.

RATES MUST YIELD SOME SUBSTANTIAL PROFIT, AND THE LAW DOES NOT REQUIRE THE SAME PROFIT ON ALL TRAFFIC.

The operating ratio on the passenger traffic is larger than the operating ratio on the freight traffic, but that proves nothing as to the relative desirability of, or profits from, the passenger traffic compared to the freight traffic.

The packers, with an operating ratio of over 95 per cent, have the reputation of being quite successful. The real issue is not what portion of the gross revenues can

be considered net profits; the question is, what is the ratio between those net profits and the value of the property devoted to that service? Ten per cent of the gross passenger revenue applied to the property devoted to the passenger service may produce twice as large a per cent of return on property, or one-half as large a per cent of return on property, as the 20 per cent of gross earnings in the freight business averages on the property devoted to the freight traffic.

The use of the roadbed has been frequently referred to as fairly apportioned between different classes of traffic in accordance with the ton miles and passenger miles using the same. Likewise, the use of terminals, it has been said, may fairly be reflected by the number of passengers and tons using the same. Unfortunately a ton of passengers compared to a ton of freight is not a very intelligible comparison. Frequently in railroad accounting it has been assumed that three passengers are equivalent to one ton of freight, not that the weight of the passengers is the test, but that the weight of the passengers plus the dead weight of the car necessary per passenger, and other extra expenses per passenger added, produce a total which justifies the ratio of 3 to 1 in the allocation of certain common expenses. The revenue from three passenger miles at 3.6 cents is 10.8 cents, compared to the revenue from a ton mile of freight traffic of from 1 to 1.4 cents. Here we see a revenue from the passenger traffic many times as large as that from the freight traffic.

It would be erroneous to assume that the operating ratio which was found to apply to passenger traffic as a whole also applied to the particular rates collected in each branch of the passenger traffic. It applies only

to the revenues collected from all the traffic in the aggregate. The operating ratio on commutation traffic, of course, would be much larger than the operating ratio derived from the 3.6 cents revenue. This is not improper. The carrier can well afford to handle a large volume of business on a small margin. The operating ratio on an excursion, where the cars are packed to the platform might be greater per individual, but here again the carrier can afford to handle the large volume at a small margin. The very large extra expense of furnishing the extra cars and engines and the labor of sidetracking other trains to make way for the excursion train, the extra clerical help, etc., all add to the expense, but those additional expenses are absorbed if the volume of traffic is large enough.

We repeat that it is erroneous to say that the Commission found the operating ratio applicable to the 3.6 cent fare was 85.24. No such finding can be secured from the statistical records of the Interstate Commerce Commission, and no citation of such authority is given by the carrier.

That is the operating ratio of all passenger traffic as a whole. It would be just as absurd for a railroad to try to impeach proposed freight rates on corn as being confiscatory, by claiming before the court that the operating ratio on all freight traffic was 80 per cent, and therefore a 25 per cent reduction in corn rates would be confiscatory.

It would be just as absurd to try to prove that John Smith is 5 ft. 10 inches tall by proving that that is the average height of all men; or, that Tom Jones is going to die at the age of 33 years, because that is the average life of all men.

An analysis of this passenger travel, independent of commutation, excursion and other special forms of travel, could have been made in the accounts of the carriers for a given period of 30 or 60 days on certain representative lines, and the probative force of such an analysis would have been quite persuasive. But the carriers did not see fit to undertake that task.

It would be wholly unfair to conclude that any particular revenue, whether from a specific class of freight, or from all freight, or from passenger traffic, or from the total business within a state, or from any other class of traffic, is confiscatory simply because of a certain operating ratio on all traffic. The controlling test is not the ratio of expenses to earnings, but the ratio of net earnings to property. That is the basis, the test used by this Court in the scores of cases that have come up to it involving the reasonableness of rates for public utilities and railroads in cities, towns and states from all over the nation.

Mr. Commissioner Prouty writing the opinion for the Commission in the Eastern Advance Rate Case of 1911, dealing with the application of the railroads for an increase in rates, discussed this factor of operating ratio in the following manner:

> "The defendants have attempted to show that the cost of operation has increased and will increase in proportion to gross operating revenue. This is not the question. Even though the percentage of net to gross is less, still the total net may be more and the percentage of net to value may also be more. We are to determine whether the net return of these carriers upon the value of their property devoted to the public service will be sufficient without an advance in their rates." (Advances in Rates, Eastern Case, 20 I. C. C. 243, 275.)

It may be claimed that in a recent case the court did

base conclusions on an operating ratio. In *Norfolk & Western* v. *Conley*, 236 U. S. 605, the court held as follows:

> "In making a reasonable adjustment of the carrier's charges, the state is under no obligation to secure the same rate of return from each of the two principal departments of business, passenger and freight; but the state may not select either of these departments for arbitrary control. Thus it would not be contended that the state might require passengers to be carried for nothing, or that it could justify such action by placing upon the shippers of goods the burden of excessive charges in order to supply an adequate return for the carrier's entire service. And, on the same principle, it would also appear to be outside the field of reasonable adjustment that the state should demand the carriage of passengers at a rate so low that it would not defray the cost of their transportation, when the entire traffic under the rate was considered, or would provide only a nominal reward in addition to cost." (*Norfolk & West Ry. Co.* v. *Conley*, 236 U. S. 605, 609, 610; 59 L. Ed. 745.)

In this case the operating ratio on passenger, mail and express traffic was found to be 97.42; and the leading witness for the state conceded that if the express traffic were eliminated the cost of the passenger traffic would be very close to 2 cents a mile, which was the total fare prescribed.

As previously shown, the fare of 2.88 cents compared to the cost of 2.58 yields a profit of over 10 per cent. There is quite a difference between a net of (100 less 97.42, or) 2.58 per cent, and a net of more than 10 per cent shown in this record. But the net of 2.58 per cent was not the final figure, because if express traffic were eliminated practically all of that profit would be ab-

sorbed, according to the admission of the leading witness for the state in that case. (*Id.* 614.)

The use of the operating ratio as a test of confiscatory rates has been in order to find whether or not there was any substantial profit and not if there was a profit, whether that was adequate.

The decision in the Conley case, *supra,* was rendered at about the same time, and was based largely upon *Northern P. R. Co.* v. *North Dakota,* 236 U. S. 585. In this case the distinction drawn between the facts there presented and those of *Minneapolis & St. L. R. Co.* v. *Minnesota,* 186 U. S. 257, also serves to distinguish the Conley case from the present proceeding:

> "The case of *Minneapolis & St. L. R. Co.* v. *Minnesota,* 186 U. S. 257, involved a rate fixed by the Railroad and Warehouse Commission of the State of Minnesota for the intrastate transportation of hard coal in carload lots. There was no proof that the carrier was compelled to transport the coal at a loss or without substantial compensation. The principal testimony, as the court observed, was intended to show that 'if the rate fixed by the commission for coal in carload lots were applied to all freight, the road would not pay its operating expenses, although in making this showing the interest upon the bonded debt and the dividends were included as part of the operating expenses.' It was said that it was 'quite evident' that this testimony had 'but a slight, if any, tendency to show that even at the rates fixed by the commission there would not still be a reasonable profit upon coal so carried' (*id.* p. 266); and this conclusion effectually distinguishes the case from the one at bar." (*Northern P. R. Co.* v. *North Dakota ex rel.,* 236 U. S. 586, 601.)

The court in the North Dakota case, cites numerous cases calling for the segregation of expenses and value, where an attack is made on the rates applicable to a

portion of the traffic, rather than on the whole schedule. In the present case the only competent evidence of record demonstrates that the rates will produce substantial profits; but we are unable to determine the ratio of those profits to the value of the property devoted to the service. Under a subsequent heading we shall see that a substantial increase in revenues can reasonably be expected from these reduced fares, and that will farther augment the profits we have described.

VOLUME OF TRAFFIC AFFECTED.

There is some doubt as to the accuracy of the carriers' estimate that 30 per cent of the traffic will make use of the scrip book.

It is true that Mr. Clink and other representatives of the traveling men estimated 25 per cent of the traffic would be on scrip books, but that was based, first, on a reduced rate of 33⅓ per cent, and second, on an increase in the volume of travel by that amount.

The Commission's finding as to the amount of traffic which was affected by the mileage tickets prior to Federal control, as stated in their report at p. 206, omits certain rather important clauses from the digest of this evidence made by the carriers. For example, where the Commission says "and at certain periods not less than 20 per cent of the total passenger revenue," etc., the words "on an average" are omitted as to the 20 per cent estimate. Further, the Commission omits the statement that in the Southeastern territory, where there was the largest reduction in the fare (amounting to 20 per cent),

the volume of traffic affected was about 20 per cent, all of which is shown at pp. 29, 31, 32, 91, 107, 220, 221, 385 and 386, on the record, as digested on pp. 14 to 16 of the carriers' brief before the Commission.

Twenty per cent would be a fairer reflection of the record based on the experience of the past, than 30 per cent. This would involve an error of one-third in amount in all the carriers' subsequent computations. However, for the purposes of this argument, we shall use the 30 per cent allowance.

The Commission adopts neither percentage specifically in its discussion of the record.

INCREASES IN PASSENGER TRAFFIC.

The general tendencies in passenger traffic were shown in evidence. The record justifies the claim that the proposed reduction in fares will be accompanied by a substantial increase in traffic.

The Commission expressed a fundamental truth when it said that other things being equal as prices are lowered sales increase. (Com. Dec. 209.)

Notwithstanding the enormous growth and development during the past few years, the constantly increasing passenger fare has retarded passenger traffic.

A reduction or an increase in the passenger fare has a powerful influence on the traffic. There is a delicate intimate relationship between the two. A striking illustration of that fact is the table presented in the decision of the Commission previously cited, on page 203. From

1916 to 1920 passenger miles increased more than 30 per cent,—from 34,500,000 to 46,800,000. The year 1920 was after the close of the war and was the year that witnessed the most phenomenal decline in prices in American history. It was the period of transfer of the railroads from government operation and control to private operation, a period of uncertainty in business generally. And yet, in 1920 we find a greater number of passenger miles than in any other year in American history.

The advance of 1918 in passenger fares was at or about the time of our entrance into the war, accompanied by a tremendous business activity. When the advance came again, in 1920, the burden was too heavy to carry. That portion of the passenger travel which had to pay 3.6 cents suffered an increase of 80 per cent over rates paid previously throughout large sections of the country. Passenger traffic then dropped severely, and there has been no subsequent reduction in passenger fares, although there has been in freight rates.

Two years later, in 1922, there were less than 33,000,000,000 passenger miles, according to the figures so far as this record shows; this was a less amount of passenger travel than existed in 1916; and a less amount, by 13,000,000,000 than existed in 1920.

From 1916 to 1920 the number of passengers per car increased 25 per cent—from 16 to 20 persons. In 1922 the number of passengers per car dropped down to 15—a lower average per car than existed six years previously, in 1916, and 20 per cent below the amount in 1919 and 1920.

The passenger traffic, due to the very nature of the loading and unloading by the individual himself, to the space in the car, and the physical situation, permits tre-

mendous expansion or retraction; and regardless of the physical facilities the volume of the traffic is exceedingly sensitive to commercial and other causes.

The carriers' reference to Section 15-A evidences a misconception of the purpose of the law, and of the purpose of the order at issue in the case. An advance in rates may decrease revenues. The rate reduction here at issue will increase revenues. After an extraordinary advance of the character made in 1920, if the Commission's hands were tied as to any further readjustments which the Commission would find warranted, Section 15-A would defeat itself.

AN INCREASE OF ONE PASSENGER PER CAR WOULD MORE THAN OFFSET THE ALLEGED REDUCTION OF $60,000,000 IN GROSS PASSENGER REVENUES DUE TO THE ORDER OF THE COMMISSION.

Carriers claim the 20 per cent reduction ordered would affect present passenger revenues collected by 3.6 cent fares, aggregating $300,000,000, thereby causing a reduction in revenues of $60,000,000 annually. In this computation there is no allowance for increased traffic.. The Commission finds "that some additional traffic would be created by a scrip ticket at reduced fares may fairly be assumed, although it is impossible to determine how much." (Commission's decision, 209.)

During the first six months of 1922 the average passengers per car was 15. (*Ante*, p. 10.) One more passenger per car paying 2.88 cents per mile would produce in gross revenues an increase of $63,302,400. (16,487,000,000 passenger miles multiplied by 2 produces 32,974,000,000 passenger miles estimated for the year. Dividing

that by 15, we have 2,198,000,000 car miles. Assuming one additional passenger per car at 2.88 cents per mile produce the total stated = $63,302,400. For figures used here, see *ante*, p. 10.) An increase of 7 per cent in gross passenger revenues. ($1,000,000,000—used to determine the 30 per cent of traffic affected—in carrier's brief before lower court; see page 85) would produce $70,000,000 gross.

With these basic figures in mind let us review the claims of the carriers.

Counsel for the railroads stated before the lower court that the estimated loss of $60,000,000 per annum was not questioned by the Commission in its findings. (Carriers' Brief, p. 94.) That same expression has been repeated at several other places in their brief and petition. As a matter of fact, the Commission did not mention that claim of the carriers in the text of the majority opinion, except as it is contained in a table prepared by the railroads and reproduced in the appendix attached to the decision without comment, as the claim of the railroads. Further, such a claim is based on the assumption that there is no increase in the traffic whatsoever, which is in conflict with the following findings of the Commission stated in its conclusion at page 209:

> "It is a well-recognized rule in trade and commerce that, other things being equal, as the price of an article is lowered the sales increase. And the fact that for many years prior to Federal control carriers voluntarily sold mileage books at discounts ranging from 10 to 33⅓ per cent is not without significance. That commutation and excursion fares create traffic is conceded by carriers. That some additional traffic would be created by a scrip ticket at reduced fares may fairly be assumed, although it is impossible to determine how much." (Commission's decision, 209.)

The fact that the Court or Commission does not mention the claim of a party to the case, is very, very far from establishing the accuracy of that claim; in fact, it is usual to deduce a contrary conclusion from such an incident.

The carriers say in their Statement of Facts, "Whether the sale of such tickets will produce a larger volume of traffic the Commission finds to be wholly a matter of speculation." This comment does not fairly reflect the conclusions of the Commission as a whole. On the same page cited by counsel in the Commission's decision, page 209, we find the statement which we have quoted above.

The carriers have made an interesting series of approximations in order to determine their passenger expenses.

On page 23 of their brief before the lower court counsel make the claim that in order to offset their alleged loss of $28,800,000 for the carriers parties to the case, occasioned by this reduction, it will be necessary for four million additional persons to travel; or, stated another way, one hundred thousand additional persons must each make forty journeys 250 miles each inside of a year. The figure 28,800,000 is simply an estimate based on the assumption that the loss of the railroads complainant will be on the same ratio as the alleged loss of sixty million is to the total revenue of one billion in the United States as a whole, or six per cent of the total revenues. The details of this computation are stated elsewhere by the carriers themselves in their brief. Consequently our computations will be made upon the figures for the country as a whole. Allowing these arbitrary percentages of apportionment in each instance would get the figures for

the railroads complainant just as accurately as they themselves have secured this figure, which is an estimate pure and simple and takes no cognizance of increased traffic, the relative density of traffic, the relative amount of traffic in this territory which would be affected by the order of the Commission, the actual passenger expenses of this class of traffic, etc., etc. This method of computation would be like a railroad within a state attempting to discredit an order of the state railroad commission by using the revenues of the railroads as a whole in the United States and finding some multiple to apply to the various national figures in order to get the state figures and then using this multiple on all factors. We do not believe that the Supreme Court would ever give serious consideration to such an attempt to nullify the orders of a state legislature or of a state commission. And yet that is precisely what the carriers in this brief have attempted to do as to one portion of the passenger traffic of the United States.

However, for the purpose of our computation, let us use the method adopted by the railroads in this case.

In order to discredit the possibility of the increased traffic offsetting this alleged loss the carriers then attempt to show the large volume of increased traffic which would be necessary to create the offset. Their methods of making this computation are quite ingenious. They assume that every additional passenger mile must have the same operating ratio as exists today. In other words, in their assumption, their premise, they have assumed the conclusion they are trying to demonstrate. By that process we are simply reasoning in a circle. If the character of the traffic we have under consideration were that of excursion, or tourist, or convention, or commu-

tation, or other traffic of that character where additional trains would be necessary to accommodate it, the reasoning might be justified. The kind of travel here under consideration has no such characteristic. This traffic will gradually invade the existing cars and trains. There will be no appreciable increase in expense. That fact is the very reason why the greater density or the greater volume added to an existing volume is of so much value to the railroads; and, on the other hand, the loss of that narrow margin has such a disastrous effect on the net of the railroads. The investment in roadbed and equipment and terminals have been made and the bulk of the expense has to go on whether the passengers travel or not.

An increase of 7 per cent in the passenger miles or an increase of one passenger per car in the United States would completely offset this sixty million dollars alleged loss. In other words, instead of having fifteen passengers per car as they did during the first six months of 1922, if they had sixteen passengers per car as in 1916, the sixty million dollars would be completely absorbed, even after allowing for some increased expenses that might be entailed.

On a subsequent page (24 of their brief) the carriers attempt to make the computation as to the amount of traffic necessary to offset the sixty million dollar alleged loss. They conclude with this sentence: "This means ten and a half billion passenger miles. Yet the Commission finds that the entire travel of all the people of the United States in the year 1921 was only 37,000,000,000 passenger miles." This computation is again based upon the fallacy that the operating ratio would continue to apply on the increased traffic the same as on the traffic

already existing. It is demonstrable by any table showing the situation for a normal period of years that the increased traffic is accompanied by a decline in the operating ratio, and that decline in the operating ratio not only applies to the increase in the traffic, but also is correspondingly reflected back in the entire volume of traffic handled. Considering this last computation, instead of 10,500,000,000 passenger miles being necessary to produce a revenue of $60,000,000, a simple mathematical computation will demonstrate that 2,090,000,000 passenger miles at 2.88 cents per passenger mile will produce the $60,000,000. And, as previously outlined, an increase of only 7 per cent in the passenger traffic of the country could readily be absorbed in the existing cars and trains, because of the character of the traffic with which we are dealing.

In their argument carriers say: "There can therefore be no reduction in cost per passenger because of handling a greater volume of traffic. More traffic means more equipment, more power, more cars, more cost." (P. 27.) It would be difficult to construct a more unreasonable comment on transportation matters than the one we have just quoted. A glance at the table contained in the Commission's decision will show that there were over nine billion more passenger miles handled in 1919 and 1920 than in 1921, and yet it is a well known fact that the railroads have increased their equipment during that same period of time. There were more passenger miles handled way back in 1917 and 1918 by several billion than were handled last year. It is an elementary principle that an increase in the volume or density of the traffic, up to the time you reach the saturation point, results in reduced costs per unit. The present situation on American rail-

roads is very far from the saturation point. The estimate of passenger miles for 1922 shows approximately 33,000,000,000 based upon the experience of the first six months. We could increase that by 13,000,000,000 or approximately 40 per cent without any increase in equipment being necessary, because that amount was handled in 1919 and 1920; this is on the condition that the said increase in the passenger traffic would be well distributed throughout the country and not in the shape of excursions and conventions.

COMMISSIONER DANIELS ON THE $60,000,000 FACTOR.

Commissioner Daniels says: "There would have to be an increase in passenger revenue of $300,000,000 in order to offset the alleged loss of $60,000,000." This computation is based upon the erroneous assumption that the operating ratio on the increased traffic would be 80 per cent. As we have elsewhere stated at length, this increased travel brought about by the order at issue would involve filling up the ordinary coaches of the carriers, and would not require additional expenses of any substantial character whatever. As evidencing this fact, we call attention to the table contained in the opinion, showing that the average number of passengers per car during the last six months of 1922 (the latest period available at the time the order was issued) was 15 passengers per car, which was the smallest average in the entire nine years stated in the table. This travel is not like that of commutation traffic where the cars are already full, and where additional passengers would necessitate additional trains or additional cars. It is not like the excursions where additional trains and cars are

necessary. It is incorrect to say that the operating ratio on this additional travel would be a cipher, even though it is true that the added expense would be nominal. The operating ratio would be very substantial on any system of accounting, even though there was no expense added to their present expenses. What would happen would be that there would be a shrinkage in the operating ratio of the balance of the traffic, and in that way this operating ratio would be spread out over the whole. In the production of this traffic there need be practically no actual increase in expense whatsoever, aside from the acounting and policing of the use of scrip tickets, which has been estimated by the carriers for the nation at $1,680,000, and that would not offset the interest on the $300,000,000 previously discussed.

The fallacy in the Commissioner's reasoning is further illustrated by the following. Let us compare the years 1919 and 1922. Multiply by two the figures for the first six months of 1922 in order to secure an estimate for the year—this is the method used by the carriers in this proceeding (in their brief before the lower court, page 85, showing estimated revenue for the year, compared to the figure for the first six months as stated by Commissioner Daniels at page 219). We then have the following factors:

	Passengers per train mile	Passengers per car	Revenue Passenger miles
1919	82	21	46,358,000,000
1922	60	15	32,974,000,000

(See Commission's Opinion, page 203.)

Dividing the factors one into the other, we have:

	Passenger train miles	Passenger car miles	Revenue passenger miles
1919	565,341,463	2,207,523,809	46,358,000,000
1922	549,566,666	2,198,266,666	32,974,000,000
1919 exceeds 1922	15,774,797 or less than 3%	9,257,143 or less than one-half of 1%	13,384,000,000 or 40.6 %

With practically the same number of car miles the carriers handled over 40 per cent more passenger miles; and this enormous increase of 40 per cent in revenue passenger miles was handled with an increase of less than 3 per cent in the train miles. If the Commissioner's theory were correct that an increase in traffic would be accompanied by an added expense of 80 per cent of the revenue —if that theory be sound, then either the railroads were much more efficient under Government Operation, which the carriers very vehemently deny; or an increase of 40 per cent in traffic should have necessitated an increase in passenger train miles of 200,000,000 instead of 15,700,000; and there should have been a greater number of car miles by 800,000,000 instead of 9,000,000.

If 40 per cent more passenger miles could be handled with an increase of only 3 per cent in train miles and one-half of 1 per cent in car miles, we contend that with the superior efficiency of private operation an increase of 7 per cent in passenger miles could be handled with only a fractional portion of 1 per cent increase in train miles and car miles, especially when that increase would be of the character which the order in this proceeding would stimulate, and especially when it would be realized by an average increase of only one passenger per car, in cars that today are almost one-half empty.

For these reasons we believe the reasoning of Commissioner Daniels as to the effect of the order, is unsound.

Commissioner Daniels mentions two roads having 50 per cent and 70 per cent, respectively, of their gross revenue in passenger travel, and he calls special attention to the peculiar circumstances affecting this revenue that would occasion a serious hardship if there should not be the room for increased passenger travel in that section to make the proper offset. Our reply to this argument is simply that those two roads should file an application and demand a hearing as to their peculiar conditions, as contemplated in the Act, and it might very properly necessitate a modified order just as the Commission has made different orders as to freight reductions and freight advances in cases applicable to the different regions of the country. Even this step might prove to be wholly unnecessary. Railroads in New England are in keen competition with the interurban traffic; and as the result of the test of the law, the scrip book might bring back to the railroads a substantial amount of the passenger travel that they are losing to the interurbans. This question can be ascertained only by the experiment or test of the law for a reasonable period.

THE ADDITIONAL COST OF $1,680,000.

Counsel for carriers claim an operating expense of $1,680,000 applicable to the handling of scrip books because of the selling, accounting and safe-guarding thereof; saying that this is additional to the cost of other passenger traffic.

In this statement they fail to make any allowance for

the use of some $300,000,000 in money which they will have use of from a month to twelve months longer than they will of the revenue from other forms of traffic. They also fail to make any allowance for a decrease in the cost of service per unit due to the increased volume of traffic.

The Commission mentions this item as an offset to the interest on the $300,000,000 which the passengers purchasing scrip books will have to advance, and concludes that the evidence tends to show that the benefit derived from the advance use of the $300,000,000 will not equal this cost of $1,680,000. In this we believe the Commission has made an error for the following reasons. These coupons are good for one year. It is admitted that the average life of the scrip books will approximate 60 days. In other words, the carrier will have the use of $300,000,000, on an average, two months longer than money ordinarily received from other passenger traffic. This will mean, at 6 per cent, approximately $3,000,000 saved in interest annually. However, the carriers claimed that they are permitted today to hold funds on interline traffic, because their accounts with other carriers are balanced monthly. Consequently, they claim under the scrip coupon system they would have the funds on an average only one month longer than at the present time. At 6 per cent this would approximate $1,500,000 annually.

This argument is of no consequence whatsoever, for the following reasons:

What one company gains by the monthly balancing of interline accounts it loses with another company. One hand washes the other. What we are here speaking of are the railroads as a whole and their use of the passengers' money for periods ranging from a month to a year.

The carriers collectively do not have possession of these funds from ordinary traffic a day before the travel occurs; while in the case of the interchangeable scrip book, they will have possession of the funds ranging from thirty days to a year in advance of the time the travel occurs. The $3,000,000 interest is a net saving, without any offset because of current interline accounting methods; and this more than equals the $1,680,000 representing additional clerical hire, etc.

The carriers in this proceeding made no effort to find what was the value of the property devoted to the passenger traffic. They have made not the slightest attempt to show the ratio of earnings to property. They have made no attempt to segregate the expense of the traffic under consideration from other passenger traffic. The case must fall of its own weight because of their utter failure to even attempt to offer the evidence that might be used to sustain their position. The burden before this Court is on the carriers, not on the Commission. You cannot guess important factors of this character when it is proposed to defeat an Act of Congress, or of the Interstate Commerce Commission on the ground that the fares ordered are confiscatory.

VI. THE EXEMPTIONS FROM THE ORDER MADE BY THE COMMISSION ARE REASONABLE AND JUST.

Carriers claim that the exemptions from the order directed by the Commission are arbitrary and unreasonable, that they create discriminations between the carriers, and that they constitute an unlawful attempt to exercise legislative powers delegated by Congress.

Counsel for the carriers, in their petition, speak of several hundred railroads being exempted; and in their brief they say:

> "There was clearly no contemplation of a blanket exemption leaving out of the scope of the order more than twice as many railroads as were included within it. The power to exempt does not include the power to discriminate against a minority by the device of a general law with exceptions covering the majority. The order, therefore, goes beyond the power of the Commission under the Act." (Brief before lower court, pp. 87, 88.)

The impression there given is that over twice as much of the transportation system of the United States is exempt from the order as that which is subject to the order. Let us consider precisely what was done as to these exemptions.

The Act provides that:

> "the Commission may in its discretion exempt from the provisions of this amendatory act either in whole or in part any carrier where the particular circumstances shown to the Commission shall justify such exemption to be made." (*Ante*, p. 7.)

The Commission exempted practically all carriers except those belonging to Class I, which includes all railroads reporting to the Commission having operating revenues in excess of $1,000,000 annually.

The Commission in the original decision listed Class I railroads to which the order applied. In its final order contained in the Supplemental Report, 10 of these were excluded (most of these were outside of the Eastern Group, and those in said group have very small operations), leaving 176 carriers subjected to the order.

This qualification was added:

> "If any of the carriers exempted should hereafter desire to establish, issue and maintain nontransferable interchangeable scrip coupon tickets under the conditions hereinbefore prescribed, our finding of exemption will not preclude them from doing so." (Commission's decision, 211.)

Counsel for the carriers are quite modest in their statement that the Commission exempted "more than twice as many railroads as were included within it." (Carriers' Brief, 87.) They should have said that the Commission left out more than five times as many railroads as were included in the order; 176 railroads were subjected to the order, and 997 excluded.

The operating companies filing reports with the Commission for the year ended December 31, 1920, were as follows:

Class I	186
Class II	303
Class III	383
Switching and Terminal Cos.	301
	1,173

(Parmelee affidavit before the lower court, dated April 7, 1923.)

And yet the whole paragraph of the carriers' brief dealing with this is a sweeping overstatement and exaggeration.

The impression as to the large volume of the American railroad system exempted from the order, which the carriers' brief seeks to give, is entirely erroneous. In the affidavit of Julius H. Parmelee, dated March 20, 1923, before the lower court (sheet 2) it is stated that 98.39 per cent of the net railway operating income of all the carriers of the Eastern group is represented by Class 1 roads. In other words, the railroads exempted by the Commission have approximately 1.61 per cent of the net income of all the carriers involved. And many of those handle no passenger traffic. The probabilities are that the exempted carriers in the Eastern Group handle less than one-half of one per cent of the interstate passenger traffic. In dealing with the situation in the country as a whole, or in the Eastern group as a whole, such an order by the Commission would seem to be well founded and just.

At various places the carriers make criticism of these exemptions directed by the Commission. The reasons cited by the Commission for the exemptions made are a sufficient answer to these contentions. The principal reasons, says the Commission, "assigned for exemp-

tion by the short lines, the electric, and the switching and terminal carriers, are that they are engaged chiefly in intrastate commerce, that their passenger traffic is negligible, that they do not honor or sell passenger tickets to and from points on other lines, that they have no passenger train service, and that there will be little or no demand of them for interchangeable scrip or mileage tickets. We are of the opinion that the particular circumstances shown to us warrant the exemption of all carriers by rail which are not included in Appendix C." (Commission's decision, 211.)

Counsel say Congress has attempted to delegate legislative functions, because no sufficient standard has been set up for the exemptions.

When the Commission was authorized under Section 1 of the Act to establish just and reasonable maximum rates, the standard set up by the statute was very meagre —this was necessarily so. The exigencies of the case made this inevitable. Likewise under this amendment to Section 22, the Congress could not specify the details warranting exceptions; that was wisely and lawfully left to the Commission. The method adopted is the practical and only one workable under the circumstances.

Another objection to the exercise of this authority goes to the claim that the carrier itself is permitted to decide whether it shall be subject to the act or not, counsel saying:

> "The Commission delegated to each and several hundred carriers to determine the question whether they should or should not become subject to the law." (Petition, p. 23.)

That is not a correct or fair statement of the order of the Commission. The Commission provided that the

listing of the carriers as exempt would not preclude such carriers from issuing the tickets under the conditions prescribed. In other words, the Commission rules that they are not compelled to charge the higher rate. Certainly that does not preclude them from so reducing their rates if they wish. Precisely the same thing is true of every maximum rate established by the Commission. The carriers may charge a lower rate if they so desire.

By this order the Commission has exempted the carriers from the rule prescribed. No action of the carrier can change that exemption from the order. No discretion in that respect is granted. But each and every carrier is permitted to charge any rate which is below the maximum if it so desires. In this case we have no attempt on the part of the Commission to prescribe a minimum rate.

Counsel say that the order discriminates between carriers because of two carriers handling freight, one can charge only 80 per cent of what the other is permitted to charge for similar service. It is common knowledge that the railroads are distributed into different classes in practically every state in the Union, and a certain percentage of increase is allowed for the smaller weaker roads. The justification for the difference is the difference in conditions.

Carriers except to a classification of the railroads on the earnings basis and place reliance upon the decision of the Court in *Cotting* v. *Kansas City Stock Yards,* 183 U. S. 79, as supporting the doctrine that a classification of stock yards on the basis of business done was erroneous and void:

> "In *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, the state argued (p. 103) that it was proper to classify stockyards on the basis of business done

> because rates may be made lower in a plant where the volume of business is large, while in a smaller plant higher rates may be necessary in order to afford adequate returns; but the court held unanimously that this classification was void." (Carriers' Brief, 33.)

Many doctrines and principles were discussed by Mr. Justice Brewer in this decision. But the limitations upon this decision so far as it can be taken as a precedent, have been expressed in a subsequent decision of the Court as follows:

> "While the opinion of Mr. Justice Brewer covers a wide range of discussion, a majority of the court (p. 114) placed the decision upon the ground that the statute of Kansas applied only to a single company, and not to others engaged in like business in the state, and thereby denied to that company the equal protection of the laws." *Arkadelphia Milling Co.* v. *St. Louis S. W. R. Co.*, 150 U. S. 134, 150, 63 L. Ed. 517, 526.

Exemption of the short line and electric railroads in the Adamson Eight Hour law was held not to constitute a violation of the principle of the equal protection of the laws. This objection of the railroads was summarily dismissed in a sentence to the effect that it had been "disposed of by many previous decisions." *Wilson* v. *New*, 243 U. S. 332, 354, citing *Dow* v. *Beidelman*, 125 U. S. 680; *Chicago R. I. & P.* v. *Ark.*, 219 U. S. 453; *Omaha, etc., R.* v. *I. C. C.*, 230 U. S. 324; *Ches. & Ohio* v. *Conley*, 230 U. S. 513; *St. Louis, I. M. & So.* v. *Ark.*, 240 U. S. 518.

In the Minnesota Rate Case, 230 U. S. 352, the Supreme Court sustained the schedule of rates established by the Minnesota Railroad & Warehouse Commission to two of the carriers and did not sustain said schedule as

applicable to a third carrier, the distinction being based on revenues.

In *Chicago, Burlington & Quincy* v. *Cutts,* 94 U. S. 155, the carrier attacked the constitutionality of a statute in Iowa regulating the railroads. One feature of the law was the classification of the railroads in accordance with their earnings, and this was sustained. Covering the objection the Court, through Chief Justice Waite, said in part:

> "The statute divides the railroads of the State into classes, according to business, and establishes a maximum of rates for each of the classes. It operates uniformly on each class, and this is all the Constitution requires. The Supreme Court of the State, in the case of *McAunich* v. *R. R. Co.,* 20 Iowa 343, in speaking of legislation as to classes, said: 'These laws are general and uniform, not because they operate upon every person in the State, for they do not, but because every person who is brought within the relation and circumstances provided for is affected by the law. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of persons within the scope of their operation.' This Act does not grant to any railroad company privileges or immunities which, upon the same terms, do not equally belong to every other railroad company. Whenever a company comes into any class, it has all the 'privileges and immunities' that have been granted by the statute to any other company in that class.
>
> "It is very clear that a uniform rate of charges for all railroad companies in the State might operate unjustly upon some. It was proper, therefore, to provide in some way for an adaptation of the rates to the circumstances of the different roads; and the General Assembly, in the exercise of its legislative discretion, has seen fit to do this by a system of classification. Whether this was the best that could have been done is not for us to decide. Our prov-

ince is only to determine whether it could be done at all, and under any circumstances. If it could, the legislature must decide for itself, subject to no control from us, whether the common good requires that it should be done." (*Id.*, 163, 164.)

VII. A TEST OF THE RATES IS JUSTIFIED.

No person can foretell with certainty the effect that any rate reduction or rate advance will have. The restoration of interchangeable mileage tickets at a reduced fare from the present basis will have a wholesome effect and will stimulate traffic; but as to how much that will be cannot be determined without an actual test. There is nothing illegal or unusual about a specified period in which to try out a schedule of rates, especially where the evidence before the court as to the alleged confiscatory character of the rates is so profoundly lacking as in the present proceeding, and also where the rates ordered are higher than the average derived from the balance of the traffic.

Counsel urge that the experiment will gather information of little avail in the determination of these issues. Even though we find out how many more people use the scrip coupon books, they ask how would that indicate what they would have traveled had not such tickets been purchased? Most of our statistical researches deal with probabilities and not with certainties so far as the future is concerned. Of course, it cannot be told with certainty how much these parties would have traveled without the existence of the order. Nevertheless, if it be ascertained

that 25 per cent of the passenger travel uses the scrip coupon tickets as estimated by the carrier in this proceeding and this is accompanied by no corresponding decline in the actual number of passenger miles of the balance of the travel, it will be indicative of the fact that additional travel has been created and not that a given amount of travel has been transformed from that using the ordinary ticket to that using the scrip book.

This same issue was presented in the Towers case (*Pennsylvania R. Co.* v. *Towers,* Maryland, April 16, 1915, 94 Atl. Rep. 331). In discussing the proposition the court said:

> "It may turn out as the result of the revision of these tariffs that there will be more monthly tickets sold and fewer of the 100-trip tickets, but all of this is to a very considerable degree a matter of conjecture merely. The true test of the effect upon the revenue of the changes made must, and can only, be the test of time and practical experience." *Pennsylvania R. Co.* v. *Towers, supra,* 337.

In support of the conclusion adopting a practical test of the rates several decisions were cited in the *Towers case* which are very much in point in our discussion. Mr. Justice Woods, in *Tilley* v. *Railroad Company,* 5 Fed. 641, after discussing the somewhat uncertain testimony as to the remunerative character of the tariff at issue, said:

> "Which view is the correct one it is impossible to decide upon the evidence submitted. There is, however, a conclusive way, and it seems to me that it is the only one, by which this controversy can be settled, and that is by experiment. A reduction in railroad charges is not always followed by a reduction of either gross or net income. It can soon be settled which is right—the railroad company's officers or the Railroad Commission—in their view of the effect of the commission's tariff of rates, by allowing

the tariff to go into operation. If it turns out that the views of the railroad company are correct, and that the schedule fixed by the commission is too low to afford a fair return upon the value of the road, the remedy is plain, for the law makes it the duty of the commissioners 'from time to time, and as often as circumstances may require, to change and revise said schedules.'" (*Id.*, 663.)

In the celebrated *Knoxville Water case*, 212 U. S. 1, the Court said:

"The courts, in clear cases, ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind. * * *

If hereafter it shall appear under the actual operation of the ordinance, that the returns allowed by it operate as a confiscation of property, nothing in this judgment will prevent another application to the courts of the United States or to the courts of the State of Tennessee. But, as the case now stands, there is no such certainty that the rates prescribed will necessarily have the effect of denying to the company such a return as would avoid confiscation." (*Id.* 18, 19.)

In *Willcox* v. *Consolidated Gas Company*, 212 U. S. 19; 53 L. Ed. 382, a similar issue was presented. The Court said:

"Of course, there is always a point below which a rate could not be reduced, and, at the same time, permit the proper return on the value of the property; but it is equally true that a reduction in rates will not always reduce the net earnings, but, on the contrary, may increase them. The question of how much an increased consumption under a less rate will increase the earnings of complainant, if at all, at a cost not proportioned to the former cost, can be answered only by a practical test. In such a case as this, where the other data upon which the computation of the rate of return must be based, are, from the evidence, so uncertain, and where the mar-

gin between possible confiscation and valid regulation is so narrow, we cannot say there is no fair or just doubt about the truth of the allegation that the rates are insufficient." (*Id.* 51, 52.)

In the syllabus of the decision appears the following:

"A court of equity ought not to interfere by injunction with state legislation fixing gas rates before a fair trial has been made of continuing the business under such rates."

This expresses in substance the conclusions of the court. After citing these various decisions the lower court in the *Towers case* concludes:

"In the case in which this opinion (referring to the Willcox decision) was rendered, just as in the case now under consideration, the court was asked to intervene before there had been any actual experience of the practical result of the rates established. So in the present case the test of experience will soon make it clear whether the rate imposed by the order of the Public Service Commission can, in any proper sense, be termed 'confiscatory' or compensatory; if the latter, no injunction ought to issue, while if not compensatory, beyond any doubt, an injunction should be granted." *Penn. R. Co.* v. *Towers, supra*, 338.

In the *New England Divisions case* decided recently (February 19, 1923), "the evidence left in the minds of the Commission many doubts," and the order was issued subject to future modification. The provisional character of the order was attacked. Mr. Justice Brandeis, speaking for the court, stated in the opinion:

"A hearing may be a full one, although the evidence introduced does not enable the tribunal to dispose of the issues completely or permanently; and although the tribunal is convinced, when entering the order thereon, that, upon further investigation, some changes in it will have to be made. * * * That the order is not obnoxious to the due process

clause, because provisional, is clear. If this were not so, most temporary injunctions would violate the Constitution." *New England Divisions Case, Akron, Canton & Youngstown Ry. Co.* v. *United States.* ... U. S. ..... ; 67 L. Ed. 308, 315.

In the present case, it must be remembered that the Commission found a probability of increased traffic; and furthermore that the rates prescribed were found to be just and reasonable for this class of traffic. Commission decision, 210.

VIII. THE ORDER OF THE COMMISSION SHOULD NOT BE INTERPRETED AS APPLYING TO INTRASTATE PASSENGER TRAVEL.

The order of the commission is attacked because of an alleged attempt to regulate intrastate commerce. Neither the statute, nor the order can fairly be interpreted as applying to intrastate traffic. The Act under which the order was made is a part of the Interstate Commerce Act, which in turn excludes intrastate traffic, except under conditions which have been the subject of much litigation of late, and which are not involved in this proceeding. The decision of the commission in the case at issue makes no reference to intrastate travel, except in connection with the short lines; then it is stated that the bulk of their travel is intrastate in character, and they are excluded from the order. The Commission does not specifically exclude or include intrastate travel in its order; but proper construction would interpret the order in harmony with the powers of the Commission just as statutes of a similar character are construed. *Texas* v. *Eastern Texas R. Co.*, 258 U. S. 204, 217; *United States* v. *Del. etc.*, 213 U. S. 366.

A similar issue has arisen frequently in New York State as to the constitutionality of state laws. *Dillon* v.

Erie is a leading case in which this subject was considered. The court said in part:

"We shall therefore confine ourselves at present to the discussion of the defendant's contention that the Act is unconstitutional because it comprehends railroads employed in interstate as well as intrastate commerce. Nothing in the act itself makes its provisions, in terms, applicable to interstate carriage of persons or property. It should not be assumed, therefore, if unconstitutionality would result, that such was the intention of the legislature. A conflict between the constitution and a statute will never be implied. *Cochran* v. *Van Surlay*, 20 Wend. 365 *Newell* v. *People*, 7 N. Y. 9, 109; *People* v. *Fisher*, 24 Wend. 215. So also, a statute cannot be said to be unconstitutional if it is not in direct and necessary conflict with the constitution (*Morris* v. *People*, 3 Denio, 381) nor unless it cannot be supported by any reasonable intendment or allowable presumption (*People* v. *Supervisors of Orange Co.*, 17 N. Y. 235). 'A statute can be declared unconstitutional only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law,' and 'until every reasonable mode of reconciliation of the statute with the constitution has been resorted to, and reconciliation has been found impossible, the statute will be upheld.' *People* v. *Board of Sup'rs of Westchester Co.*, 147 N. Y. 1, 16, 41 N. E. 563, 566." (*Dillon* v. *Erie R. Co.*, 43 N. Y., Supp. 320, 325. See also *Purdy* v. *Erie R. Co.*, 162 N. Y. 43. 56 N. E. 508, 511.)

IX. THE REQUIREMENT OF INTERLINE CREDITS DOES NOT CONSTITUTE A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Paragraph XIX of Carriers' petition claims the commission's order is void because it requires one carrier without its consent, to furnish transportation upon the credit of another carrier, which may entail losses, thereby taking property without due process of law.

Such losses must necessarily be a part of the costs of the public service which the carriers are rendering. They are an essential element of any national transportation system operated by different private corporations. They are an incident to the service that has been recognized from time immemorial as a part of the burden they must carry. The railway companies are constantly assuming such credit in all interline shipments where accounts are settled monthly; they are assuming such credit whenever a car leaves a home line for another railroad. In the lower court's and in the commission's decisions these same principles have been approved.

A claim similar to the one presented by the carriers on this subject has been repeatedly advanced in cases dealing with the railroads collectively. The issue was handled in a masterly manner in *Atlantic Coast Line* v.

Riverside Mills, 219 U. S. 186, involving the liability of the initial carrier under the Carmack Amendment.

The interline credits are a part of the responsibility that carriers must assume when they undertake to engage in interstate commerce.

> "The rule is adapted to secure the rights of the shipper by securing unity of transportation with unity of responsibility." (*Id.* 203.)

One of the early mileage book cases was decided by the Supreme Court of Massachusetts, entitled, *Attorney-General* v. *Old Colony Railroad*, 160 Mass. 62; 22 L. R. A. 122. This decision was rendered in 1893. The majority held that the law was a valid exercise of legislative authority, except in that it required one railroad to accept the credit of another railroad on the interchangeable mileage ticket. The court declined to hold the law unconstitutional on the ground that it contained a delegation of legislative power to the Board of Railroad Commissioners so far as determining companies that would be exempt from the provisions of the Act was concerned.

In regard to the subject of interline credit the majority opinion stated:

> "The most formidable objections are that the statute authorizes one railroad to determine the conditions on which another railroad must carry passengers, and compels one railroad to carry passengers on the credit of another." (*Id.* 119.)

In the majority opinion the court said, "We have been referred to no judicial decision where any such legislation has been considered." Mr. Justice Knowlton filed a dissenting opinion, which was concurred in by Mr. Justice Holmes, now of the Supreme Court. The Justice held that this ruling as to accepting the credit of other railroads, was a proper exercise of legislative power in

the premises, and he explains the doctrine ably in the following language:

> "It is a matter of common knowledge that every railroad does business on the credit of other railroads to a much larger amount than would ever be done under a statute of this kind. But, suppose there is a possibility of trifling loss in a case which might arise under the statute, that does not render the statute unconstitutional. The question is rather whether there is a probability of losses so large as to make such a requirement plainly unjust and unreasonable as an interference with the 'right of acquiring, possessing and protecting property.' I think nobody can contend that there is such a probability. Moreover, the very idea of the exercise of the police power necessarily implies a greater or less interference with the acquisition, use and enjoyment of property. *Sawyer* v. *Davis*, 136 Mass. 239, 49 Am. Rep. 27; *Miller* v. *Horton*, 152 Mass. 540, 10 L. R. A. 116." (*Id.* 123.)

Relative to the scope of this police power, the Justice said:

> "The property of railroad corporations is devoted to the public use. The truth of this proposition is nowhere questioned. Such corporations may exercise the right of eminent domain by taking lands for their roads against the will of the owners. The business of providing highways and arranging conveniences to enable people easily to pass from place to place is a part of the public business which may be done by the State. If the State grants franchises and delegates the transaction of this business to corporations, it retains the right to regulate the business for the public good in any reasonable way." (*Id.* 122.)

The dissenting opinion in that Massachusetts case of thirty years ago expresses the law of today.

The lower court has correctly summarized the law in this respect as reflected in *Atlantic Coast Line R. Co.* v

Riverside Mills, supra, 219 U. S. 186; *Michigan R. Co.* v. *Michigan Railroad Com.,* 236 U. S. 615 (concerning the control over the interchange of cars), and *St Louis S. W. Ry. Co.* v. *U. S.*, 245 U. S. 136 (relating to the power to require joint rates); *N. Y. C.* v. *U. S. supra,* 951, 954.

SUMMARY.

After the war there has been a struggle in all lines of business to get matters back to the pre-war basis, to reinstate the customs and standards that had been gradually evolved by generations of experience. This has applied to the railroad industry. The railroads have voluntarily reinstated many of the rules and regulations and practices which were suddenly wiped away at their instance, when the Director General took charge of the railroads in 1918. But one of the hardest tasks the people have had to perform is to have restored some form of interchangeable tickets on conditions similar to those existing prior to the war.

The carriers today have in effect interchangeable scrip coupon tickets of denominations of $15, $30 and $90, sold at the standard one-trip fares, and interchangeable among practically all railroads, except electric and short line carriers. (Com. Dec., p. 205.) The Commission's order in this case undertakes to prescribe rates, rules and regulations applicable to what the carriers themselves maintain at the present time. The Commission's order exempts the electric and short lines, as do the carriers at the present time.

The rules and regulations proposed by the Commission have been agreed to with but few exceptions, by the car-

riers; and the issues are confined almost entirely to the fare prescribed.

In the effort on the part of the railroads to defeat the Act of Congress and the decision of the Interstate Commerce Commission's at issue in this proceeding, the carriers rely chiefly on the following propositions: that the order will create discriminations among passengers; that the order will reduce passenger revenues to a confiscatory basis; and that the Commission misconstrued the law.

In developing these various issues counsel for the railroads have fallen into numerous errors, both of law and of fact.

The carriers have failed to present to this court any evidence of the value of the property devoted to the service under consideration.

The carriers have failed to present any evidence of the expenses chargeable to this traffic, which is at issue.

In order to come within their interpretation of the Lake Shore decision, the carriers have claimed that the Interstate Commerce Commission has established a standard just and reasonable fare of 3.6 cents per passenger mile for the United States as a whole, and that any rate established by the Commission below that fare will create unlawful discriminations.

At the present time there is no fixed charge for passenger traffic throughout the United States, which has been established by Congress, the Commission or any other governmental body. (*Ante*, pp. 32-34, 45-48.) Counsel for the railroads have made a basic error in this respect. In addition to that, the railroads cannot be heard to set up this complaint of discrimination between passengers. (*Ante*, 41, *et seq.*)

The record shows that the prevailing fare for one trip tickets is 3.6 cents per passenger mile, the average fare for all passenger travel is 3.03 cents, the average fare on 75 per cent of the travel in the United States (the portion unaffected by the Commission's order) is 2.84 cents, and the average cost for all passenger traffic is 2.58 cents per mile. (*Ante*, 33-39, 105.)

If the conditions have warranted such a large volume of fares to be established for excursions, conventions, commutation service, tourist service, etc., that the average fare paid on 75 per cent of the passenger travel of the nation has been brought down to 2.84 cents per mile, and if the average cost on all passenger travel is 2.58 cents per mile, we fail to see the force to the argument that the Commission has created a special favored class at unremunerative, confiscatory rates, when it requires the carriers to haul the balance of the population at 2.88 cents per mile whenever an individual purchases a 2,500 mile ticket to be used within one year, which is an amount seven or eight times greater than the travel of the average individual in the United States.

The carriers have made a number of mistakes of fact other than those suggested above, including the following:

First, they have exaggerated the amount of the railroad industry which has been exempted by the Commission from its order. (*Ante*, 129-131.)

Second, they have erroneously applied the operating ratio of the passenger business, assuming that it was not only true in regard to the passenger traffic as a whole, but also as to each department of the passenger service, and as to every dollar of passenger revenue. (*Ante*, 104.)

Third, the carriers claim that the order will cause a loss of $60,000,000 in passenger revenue. This is a computation based on two alternative assumptions: (a) that 30 per cent of the passenger revenue (or 25 per cent of the passenger miles) will be affected by the 20 per cent reduction, and there will be no increase whatever in the volume of travel in the United States by virtue of the order; or (b) that the increased travel will be handled at an average cost per mile approximating that of the present travel. Both assumptions are untenable, and contrary to the weight of evidence before the Commission and before the court. (*Ante*, 117 et seq.)

Fourth. Counsel for the railroads say that it will take an increase of more than 25 per cent in passenger travel before there will be any reduction whatever in the alleged loss of $60,000,000 decrease in passenger revenues; whereas, any increase at all in travel will in fact tend to offset that loss, whether the increase is ½ of 1 per cent or 40 per cent. An increase of only 7 per cent of the travel, or an increase of only one passenger per car (and today these cars are almost one-half empty on an average) will more than offset this entire $60,000,000. (*Ante*, 120.)

Counsel for the carriers place great reliance upon the doctrine of the Lake Shore Case, holding that "The Legislature having fixed a maximum rate at what must be presumed, *prima facie*, to be also a reasonable rate, we think the company then has the right to insist that all persons shall be compelled to pay alike. * * *" Regardless of the basic error of fact on the part of the carriers which makes that doctrine inapplicable to the present proceeding, the doctrine itself is unsound, for the legislature has the power to vary rates in accordance

with varying circumstances and conditions. The use of the Lake Shore decision as a precedent should be limited very definitely to the facts and circumstances there presented; and to the extent that it is in error on those facts, the Lake Shore decision should be overruled. There is abundant precedent for such action in the treatment accorded to *Cotting* v. *K. C. Stock Yards, supra,* in *Arkadelphia Milling Co.* v. *St. L. S. W. R. Co., supra,* and also the treatment accorded the decision in the Lake Shore case, in the decision of this Court in the Tower case, *supra.*

Counsel for the carriers have relied on doctrines stated in the Lake Shore case which have not been accepted as the law, but have been condemned in other decisions; they have misinterpreted the decisions of the Interstate Commerce Commission in the cases entitled: Increase in Rates, 1920, and Reduced Rates, 1922, *supra;* they have distorted the decision of the Supreme Court of New Hampshire in *State* v. *Railroad, supra;* and they have misapplied the doctrines of *Cotting* v. *Kansas City Stock Yards, supra.*

Concerning the claims that the Commission based its order upon the provisions of the amendment to Section 22 of the Interstate Commerce Act, erroneously believed to be mandatory, and not upon its own independent judgment, nor upon the facts before it, we cite the following:

The Commission prescribed in its original notice as one of the leading subjects to be investigated: "What rate or rates shall be established as just and reasonable for each and every form of ticket?"

The Commission, in its decision, interpreted the law under which it was acting as leaving to the Commission

"to determine after notice and hearing the 'just and reasonable rates' at which the form of ticket prescribed shall be issued."

And further, the Commission specifically held "that the rates resulting from that reduction will be just and reasonable."

This brief is filed on behalf of the traveling man. It is true that the establishment of the lower passenger fares for interchangeable scrip coupon books will be of value to the commercial traveling men of the United States. However it is not contemplated that they shall constitute a class unto themselves, but rather that the privilege shall be open to all parties.

Mr. D. K. Clink, a representative of the federation filing this document with the Court, testified before the Commission in substance as follows: The comments of the representatives of the railroads concerning traveling men are unjust. They are on the road approximately 10 months of the year. No class or profession of our citizenry devotes more hours to arduous labor. No fixed prescribed hours of labor can apply to the traveling salesmen—they are on the move night and day, deprived of home comforts and hours of recreation. Their business activities and optimism are a stimulant to the country's development and progress. They are an indispensible and valuable national asset. References to ability to pay the full single trip fare were unhappy. Those privileged to avail themselves of tourist and summer and winter resort fares at a discount ranging from 25 to 50 per cent under the basic one-way fare, spending their time in luxury and comfort, are those who should be classed as best able to pay the basic one-way fare. "A reduction in fares would re-employ thousands now

idle and add additional thousands to the ranks of the traveling fraternity. The commercial travelers and employers ask for no special privileges, nor do they expect something for nothing. They do expect and should receive consideration commensurate with their enormous patronage and their indispensible activities of lasting benefit to the nation and its people."

Cost of service, and public policy, both are matters to be given proper consideration. The traveling man not only furnishes passenger traffic, but he is an important factor in creating freight traffic, and on him depends, to a large extent, the operation of the mills and factories of the United States.

But the traveling men are not asking to be treated as a class. They are before this Court urging the wisdom and justice of a distinction based upon differences in conditions.

There is a marked difference between the distance traveled by the average individual in the United States, and the distance traveled annually by a party in order to comply with the provisions proposed as to these scrip books. The total revenue passenger miles per inhabitant, aside from those who will probably purchase the scrip books, range from 250 to 350 miles annually compared to 2,500 miles as the minimum under the Commission's order. (*Ante,* 91, 92.)

The traffic which this order will stimulate is not spasmodic, but it is of such a character that it will fill up existing equipment.

If all of us traveled as much as the minimum in this order, the passenger revenues of the railroads would increase several hundred per cent.

More travel per train mile means less cost per unit; and that portion of the traffic creating the greater net should be credited with it in any fair system of accounting for the determination of the profit from the traffic. That is precisely what the railroads themselves do in their consideration of the profitableness of tourist, excursion, convention and other forms of travel.

The wisdom of the Act of Congress, and of the order of the Commission thereunder, is not at issue before this Court.

We submit that there is substantial evidence in support of the conclusions announced by the Commission; and that the order at issue is sustained by the weight of authority.

Respectfully submitted,

CLIFFORD THORNE,
JAMES W. GOOD,
Counsel for the International Federation of Commercial Travellers' Organizations.

Chicago, Illinois, Sept. 15, 1923.

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 469.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, NATIONAL COUNCIL OF TRAVELING SALESMEN'S ASSOCIATIONS, *et al*, APPELLANTS

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, ATLANTIC CITY RAILROAD COMPANY, ATLANTIC & ST. LAWRENCE RAILROAD COMPANY, *et al*,

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Appeal from the District Court of the United States for the District of Massachusetts.

BRIEF BY LEON B. LAMFROM

Amicus Curiae.

INDEX OF POINTS

Page of Brief

POINT I.

POINT II.

POINT III.

INDEX OF CASES

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

THE NEW YORK CENTRAL RAILROAD COMPANY; ATLANTIC CITY RAILROAD COMPANY, ATLANTIC & ST. LAWRENCE RAILROAD COMPANY, *et al*, *Petitioners*, against THE UNITED STATES OF AMERICA, *Respondent*.	In Equity, No. 1808

BRIEF BY LEON B. LAMFROM

Amicus Curiae.

The undersigned member of the bar of Milwaukee, Wisconsin is general counsel for the National Association of Men's Apparel Clubs, a national organization of traveling salesmen throughout the United States, totaling approximately six thousand members. The national association is composed of constituent apparel clubs having offices in twenty-four different states and representing in turn thirty-three states. All of the traveling men who are members of the national association are also members of the local clubs and are all engaged for a substantial part of the year in traveling upon the railroads of the country in their business of selling men's apparel.

All of the members of the National Association of Men's

Apparel Clubs, together with the general public, will be vitally effected by the decision in this case.

POINT I.

THE INTERSTATE COMMERCE COMMISSION HAVING BEEN CREATED BY CONGRESS IS UNDER THE SAME LEGAL CONTROL BY CONGRESS AS THE INFERIOR FEDERAL COURTS, AND BEING A FACT-FINDING BODY CAN BE DIRECTED BY CONGRESS TO FIND A FACT.

Prior to the passage of the act in question and under construction in this case, it would seem that the Interstate Commerce Commission had no power to order the railroads to issue interchangeable mileage tickets.

Under Section 22 of the Interstate Commerce Commission act as amended by the acts of March 2nd, 1889, February 8th, 1895 and August 8th, 1922 it was provided that nothing in the act shall prevent the issuance of joint interchangeable 5000 mileage tickets with special privileges as to the amount of free baggage that may be carried under the mileage tickets of 1000 or more miles. It was, however, left to the carriers to determine as to whether these mileage books shall be issued and there was nothing in the act to give the Interstate Commerce Commission at least express authority to direct the issuance of such mileage books. Evidently, and it must be presumed that it was in furtherance of some public policy, congress decided that there should be authority in the Interstate Commerce Commission to direct the issuance of interchangeable mileage or scrip coupon tickets. Congress went even farther. It

directed the Commission to require the issuance of the interchangeable mileage scrip coupon tickets *at just and reasonable rates.* (Record 28, 29, 30, 31.) So far then, we have a direction from congress to an agency created by congress to ascertain only one thing that is important and substantial: that is the just and reasonable rate at which the interchangeable mileage or scrip coupon tickets should be issued.

It must be assumed that in finding such rate, the Interstate Commerce Commission found it just and reasonable. In its conclusion, after taking evidence on the question, the Interstate Commerce Commission said:

> "We further find that the rates resulting from that reduction will be just and reasonable for this class of travel." (Record 51.)

This is a finding of fact by the Interstate Commerce Commission which must stand alone as being the ultimate conclusion that the rate established was just and reasonable.

Courts do not take the initiative in determining rates, and the rule established is that the courts will not interfere with an act of the Commission unless it clearly appears that such an act or finding is beyond its authority.

Interstate Commerce Commission v. Louisville & Nashville Railroad Company, 190 U. S. 273;
Texas & Pacific Ry. Co. v. Abilene Cotton Oil Company, 204 U. S. 426;
Prentis et al v. Atlantic Coast Line Company, 211 U. S. 210.

It would clearly appear that all that Congress did was to direct the Interstate Commerce Commission to require the carriers to issue interchangeable mileage or scrip coupon tickets, which was at most a legislative direction to an administrative agency, the legality of which cannot be doubted. Having, after an extensive hearing, decided what the just and reasonable rates should be for such interchangeable mileage or scrip coupon tickets, can such finding, in effect, now be set aside by the court, because the court has come to the conclusion that Congress did not intend that it should be mandatory upon the Interstate Commerce Commission to reduce the rates and that it would seem that the Interstate Commerce Commission concluded possibly that it was mandatory, or what it believed to be the spirit and purpose of the act, if the rate found was just and reasonable?

POINT II.

IF THE RATE FOUND BY THE INTERSTATE COMMERCE COMMISSION IS JUST AND REASONABLE AND WAS MADE AFTER PROCEEDINGS TAKEN AT THE DIRECTION OF CONGRESS, THE INTERPRETATION OF THE INTERSTATE COMMERCE COMMISSION OF THE INTENT AND MEANING OF THE CONGRESSIONAL ENACTMENT IS IMMATERIAL.

In passing upon the question of the just and reasonable rate, the Interstate Commerce Commission said in its decision:

"In addition to the obvious spirit of the law the record warrants the view that a coupon ticket at a reasonably reduced fare should be established at least for an experimental period. In no other way can the apparent purpose of the law be given practical effect." (Record 51.)

The court below seems to have been in error, in unduly emphasizing this comment of the Interstate Commerce Commission. We take it that the most that can be said with regard to this expression of the Interstate Commerce Commission on the spirit of the law is that it was merely an observation of an agency of a legislative body. There is nothing in the decision that would indicate that the Interstate Commerce Commission would not have found a just and reasonable rate if it had not expressed its view as to the obvious spirit of the law. The fact remains that it did find a just and reasonable rate, and that that rate was found upon evidence presented. All that Congress had required the Interstate Commerce Commission to do was to find such just and lawful rate and then to require the carriers to put it in force. What difference can it possibly make as to what the Interstate Commerce Commission's interpretation was as to the spirit of the law? No serious question can be raised to the right of Congress to require the railroads to issue interchangeable mileage books if such requirement does not conflict in some manner with accepted principles of constitutional law. The lower court held that the amendment itself was not unconstitutional, and in no way attempted to pass upon the question of the just and reasonable rate. Therefore, the basis upon which the lower court issued the permanent injunction against the enforcement of the order of the Commission was plainly

not upon the challenge of the right of congress to so legislate, nor upon the basis that the Interstate Commerce Commission erred in its finding, but only upon the basis that possibly the Interstate Commerce Commission might have thought that the act was mandatory upon it in respect to a reduction in the rate; or that the Interstate Commerce Commission did not exercise its own judgment in reducing the rate and thus abdicated its function.

It would seem to be a well established principle of law that before the court could interfere with the order of the Interstate Commerce Commission in this regard, that such order must plainly appear to be void as violative of the constitution or wanting in conformity to statutory authority or that the power of the Commission has been arbitrarily exercised.

St. Louis South Western Ry. Co. et al vs. United States, et al, 234 Fed. 668.

POINT III.

ASSUMING THAT THE UNDERSTANDING OF THE INTERSTATE COMMERCE COMMISSION WAS THAT THE CONGRESSIONAL LEGISLATION IN EFFECT WAS TO LOWER THE RATE, AND NOTWITHSTANDING SUCH LEGISLATION THE RATE FOUND BY THE INTERSTATE COMMERCE COMMISSION AS REDUCED IS JUST AND REASONABLE, IT IS CONTENDED THAT THIS IS NO CAUSE FOR ENJOINING THE ENFORCEMENT OF THE ORDER OF THE COMMISSION.

Is there anything unlawful in a congressional direction to the Interstate Commerce Commission indicating that it, Congress, thinks that a certain rate applying in interstate commerce is too high, and that the Interstate Commerce Commission should therefore establish a just and reasonable rate? We think that we can unhesitatingly answer this question that such an act would not be unlawful, nor would the performance under it by the Interstate Commerce Commission of its direction be unlawful, if the Interstate Commerce Commission found as a fact the just and reasonable rate.

Vesting of power by legislative bodies in commissions does deprive the legislative bodies of directory control, provided in the exercise of that directory control, rights established by other principles of law, either legislative or constitutional, are not violated. There is nothing in the record to show that the Interstate Commerce Commission found the just and reasonable rate on anything else but the evidence. That we think is fundamental to the whole case and must determine it.

It seems to us that the whole question comes down, not to the interpretation by the Interstate Commerce Commission of the motive back of the legislation, but only the question of whether or not under the directory legislation of Congress, the Interstate Commerce Commission acted arbitrarily or in excess of its power, or has issued a rule or order that is unreasonable or unlawful.

The only question involved here we think, outside of the reasonableness of the rate, is the power of the Interstate Commerce Commission under this legislation to issue the order.

In this regard the power of the Interstate Commerce Commission under the act to make the finding that it did is evident because by the act it was directed to require the carriers to issue the books or tickets at just and reasonable rates. Having exercised that power and having exercised it reasonably, what other possible valid reason can be left by which to attack the action of the Commission? Courts have determined again and again that they are not concerned with the motive of legislative enactments.

The Interstate Commerce Commission, being in effect an arm or creature of Congress, can the court pass upon the motive under which the Interstate Commerce Commission acted if it acted within its power and in a manner that was reasonable?

Assuming that congress did not necessarily intend by the act in question to have the Interstate Commerce Commission lower the rate, nevertheless, it did direct the Interstate Commerce Commission to find the just and reasonable rate. The latter is the substance of the legislation. All that the Interstate Commerce Commission did was to carry out the substance of the legislation and in doing so it ascertained the just and reasonable rate for this class of service, to be lower than the regular rate.

Is there anything wrong in an administrative body being actuated by what it conceives to be the spirit of the law when its ultimate finding is only a finding of fact? How can it be said that the order of the Interstate Commerce Commission is erroneous because, if we admit, for

the purpose of argument, it misconceived the desire of Congress, if in carrying out the legislative direction it found that the rate should be lower and misconceived this to be the implied direction of congress?

We contend, with all deference, that it cannot, correctly be said, as was said by the lower court in its decision:

> "If, on the other hand, it acted upon the interpretation which we have found to be the correct interpretation of the amendment but based its conclusions, not upon its own independent judgment, but what it believed to be the spirit and purpose of the act, which, if it means something other than a sound interpretation of the act, must mean some supposed desire of the Congress, it acted contrary to law in abdicating the functions vested in it," (Record 164)

because of the fact that the Interstate Commerce Commission did find as a matter of fact that the just and reasonable rate for this class of service was lower than the regular rate. There is nothing in the record to show that the finding of the Interstate Commerce Commission was induced by anything but its deductions from the evidence submitted upon the hearing. The fact that it might be mistaken in its interpretation of the intent of the law, cannot render its decision invalid if its decision as to the ultimate thing to be found is correct.

It is therefore respectfully urged that the order of the District Court be reversed.

Respectfully submitted,

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Amicus Curiae.